No. 218

108

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1338.~~ 66

THE MANHATTAN MEDICINE COMPANY, APPELLANT,

vs.

NATHAN WOOD AND JOHN T. WOOD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

FILED OCTOBER 13, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 333.

THE MANHATTAN MEDICINE COMPANY, APPELLANT.

vs.

NATHAN WOOD AND JOHN T. WOOD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

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1 Circuit court of the United States, district of Maine. In equity

THE MANHATTAN MEDICINE COMPANY, complainant,
vs.
NATHAN WOOD ET AL., RESPONDENTS.

PLEADINGS AND EVIDENCE.

Chase & Bestow, for complainant.
Wm. Henry Clifford and Nathan Webb, for respondents.

2, 3 Circuit court U. S

On the twentieth day of May, A. D. 1875, Philo Chase, solicitor, filed the following:

Bill of complaint.

THE MANHATTAN MEDICINE COMPANY
vs.
NATHAN WOOD & JOHN S. WOOD. } No. 78. In equity.

To the judges of the circuit court of the United States for the district of Maine, sitting in equity.

The Manhattan Medicine Company, of the city of New York, a corporation duly created and existing under the laws of the State of New York, and legally a citizen of the State of New York, brings this its bill of complaint against Nathan Wood and John S. Wood, who compose the firm of Nathan Wood & Son, both of the city of Portland, in the State of Maine, and both citizens of said State of Maine.

And thereupon your orator complains and says that your orator is now and was at and for a long time previous to the committing of the grievances by the defendants hereinafter mentioned, the manufacturer and vendor of an article of medicine called and known as "Atwood's Vegetable Physical Jaundice Bitters," a medicine used internally
4 as a remedy for the cure of jaundice and other diseases. That during all the time your orator has been engaged in making and selling said article of medicine, it has made, put, up and sold the same in the manner and with the trade-marks, labels, and wrappers affixed thereto, as follows, viz, in glass bottles with twelve panel-shaped sides, having on five of such panel sides, the raised words and letters "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.," blown in the glass, on each bottle, each bottle holding and containing about pint of said medicine in a liquid form, and labelled with a light yellow printed label pasted on the outside, of which printed label the following is a copy, viz:

ATWOOD'S VEGETABLE PHYSICAL JAUNDICE BITTERS.

This is an effectual cure for jaundice, headache, dyspepsia, worms, dizziness, loss of appetite, darting pains, colds, and fevers. It cleanses the blood from humors and moistens the skin. It is also good for liver complaints, strangury, dropsy, croup and phthisic.

DOSE for an adult, from half a tablespoonful to half a wineglassful, according to the strength of the patient.

DIRECTIONS.—For jaundice or headache, it should be taken every morning half an hour before eating. For dyspeptic complaints, spitting up food and distress at the stomach, take a teaspoonful immediately after eating. For worms, or any sudden attack of pain in the stomach, it should be taken immediately. For fevers it should be taken in large doses, once in four hours, while it operates smartly as physic; at the same time take a good sweat—then continue taking a little bitters every morning, sufficient to keep the bowels in good order. For liver complaints it should be taken the same as in dyspepsia at the same time applying one of Atwood's Strengthening Plasters between the shoulders, and wherever the patient has the most pain, which generally effects a cure in a short time, if administered in season. It is safe in all cases, and meets the approbation of all who have had an opportunity of using it.

Manufactured by MOSES ATWOOD,

Georgetown, Mass., and sold by his agents throughout the United States.

Said bottles were so filled and labelled, being put up in half-dozen packages, with the same label posted on the outside of each package.

That your orator is informed and believes, and alleges that said medicine was first invented and put up for sale about twenty-five years ago by one Dr. Moses Atwood, formerly of Georgetown, Massachusetts, by whom, his assigns and successors, the same has been ever since made and sold, by the name; in the manner, and with the trade-marks, labels, and description the same or substantially the same as aforesaid.

That at and long before the committing of said grievances by the defendants, your orator had become and was the lawful and sole and exclusive owner of the formula or recipe for making said medicine, and of the sole and exclusive right to use said name or designation therefor, together with all said trade-marks, labels, and good will of the business of making and selling said medicine; and your orator still is such sole and exclusive owner.

That your orator, and its predecessors in said business, have extensively advertised said medicines, at great cost, by such name, trade-mark, and description, and made the same well known thereby to the public throughout the United States and Canadas; that reason of the great curative properties of said medicine, the care and skill of your orator in making and putting up the same, and such extensive advertising, it has deservedly obtained high repute with the public generally as a valuable medicine; that said medicine, under said name and description, has commanded, and still commands, very large sales, aggregating about 12,000 bottles per annum, and the business of making and selling the same is very profitable to your orator.

And your orator, further complaining, says that notwithstanding the premises, they, the said defendants, well knowing the premises, and wrongfully and fraudulently intending to injure and defraud your orator, and deprive it of its just gains, and mislead the public and buyers and consumers of said "Atwood's Vegetable Physical Jaundice Bitters," on the 6th day of May, A. D. 1875, and on divers other days during the year 1875, prior and subsequent to the said 6th day of May, previous

to the filing of this bill, at the city of Portland, in the State of Maine aforesaid, and at divers other places within the United States, unknown to your orator, manufactured and sold, and are still manufacturing and selling, large quantities of an article of medicine in imitation of your orator's said "Atwood's Vegetable Physical Bitters," but greatly inferior in quality. And said defendants, in disregard of your orator's rights, without its consent, have, during all said times, willfully and fraudulently used, and still use the name of your orator's said article, to wit, "Atwood's Vegetable Physical Jaundice Bitters," to designate and sell thereby their said imitation article, and have so wrongfully and fraudulently used, and still use for putting up their said imitation article for sale, imitation bottles of the same size and shape and appearance as your orator's said bottles, with the same or nearly the same words blown upon the corresponding sides of each bottle, and have so fraudulently and wrongfully used, and still so use on their said imitation bottles in the sale of their said imitation article, labels in imitation of your orator's said labels of almost exactly the same size, shape, color, and ap-
7 pearance, and having printed thereon almost exactly the same words and letters.

That your orator has caused one of its genuine bottles, with the genuine label thereon, to be marked with your orator's initials, viz, T. M. M. C., written on the upper corner of the label, by your orator's president, and also caused one of the defendants' said imitation bottles, with the imitation label thereon, to be marked in a similar manner with the initials of Charles E. Parker, viz, C. E. P., to whom said defendants sold said imitation medicine, which said bottles and labels respectively, your orator asks leave to refer to, and to be made a part of this bill, the same as if annexed as exhibits hereto.

Your orator, further complaining, says that the said defendants have, during all the times aforesaid, made, put up, and sold, and still make, put up, and sell their said imitation and counterfeit article, as and for your orator's genuine article; that the defendants' said imitation article, put up, marked, and labeled as aforesaid, is very difficult to be distinguished from your orator's said genuine article. Wherefore said imitation article is calculated to, and is intended by said defendants to deceive purchasers and to mislead them to purchase and use their said imitation and spurious article as and for your orator's said genuine article, and the defendants' said imitation article has had and does have that effect; whereby your orator is unjustly deprived of the large sums of money it would otherwise have made and received as profits from the sale of its said medicine.

Your orator, further complaining, says that it is constantly expending large sums of money for advertising its said medicine under the name and description aforesaid, but that the defendants, as your orator is informed and believes, and alleges, does not advertise its said imitation medicine but little, if any at all, but depends upon and receives the benefit of your orator's advertising.

8 That said imitation article is greatly inferior in quality to your orator's genuine article, and the defendants' said article being largely sold as and for your orator's articles, your orator's article is thereby greatly injured in its character and reputation, and its sales greatly diminished, to the great loss of your orator.

That your orator has invested and has a large amount of capital in the business of making and selling its said medicines, which is seriously deteriorated in value by the said wrongful doings of the defendants.

That, as your orator is informed and believes, and alleges, the de-

fendants have on hand large quantities of their said imitation and counterfeit article, put up, marked, and labeled as aforesaid, which they intend and are about to put upon the market for sale, and which, if done, will cause great injury to your orator.

That unless said defendants are restrained from further continuing their said wrong-doings, your orator will be irreparably injured in its capital, business, trade-marks, and otherwise.

That your orator has already sustained damages by means of the aforesaid wrongful and fraudulent acts of the defendants in the sum of ten thousand dollars.

To the end, therefore, that your orator may have relief in the premises in this honorable court, where only adequate relief can be afforded, your orator prays—

First. That the defendants be required to answer each and every allegation of this bill, as fully and to the same extent as if they were respectively interrogated in respect thereto.

Second. That the said defendants may be compelled to render a full, true, and proper account of all profits of any description, which they have made or might have made by the sale of this said fraudulent imitation of your orator's said medicine, and all the profits which
9 your orator would have made on the sale of its said genuine "Atwood's Vegetable Physical Jaundice Bitters" but for said defendants' wrongful infringement of your orator's rights, and all profits which said defendants have made by the use of the simulated trade-marks or labels having such near resemblance to those of your orator's, as aforesaid, as might be calculated to deceive, and that said defendants pay over to your orator all such profits.

Third. That said defendants be required to pay to your orator also, all loss and damage which your orator has suffered by reason of their infringement of and their interference with the rights of your orator, which your orator alleges to the said sum of ten thousand dollars.

Fourth. That the said defendants, their attorneys, solicitors, counselors, clerks, agents, servants, and each of them, be forever restrained by an injunction to be issued out of this court, from affixing or applying, or causing to be affixed or applied to any article of medicine manufactured, sold, shipped, or supplied by them, or to the bottles or packages in which the same is put up, your orator's trade-mark words, viz, "Atwood's Vegetable Physical Jaundice Bitters," or either of said words or any imitation thereof, as the whole or any part of the name or designation of said medicine so shipped or supplied by them, said defendants, their attorneys, solicitors, counselors, clerks, agents, servants, or either of them, and that they, said defendants, their attorneys, solicitors, counselors, clerks, agents, servants, and each of them, be further forever restrained from affixing or applying, or causing to be affixed or applied to any article of medicine manufactured, sold, shipped, or supplied by them, said defendants, their attorneys, solicitors, counselors, clerks, agents, servants, or either of them, or to the bottles, packages, or wrappers in which the same are put up, any of the trade-marks or labels described and hereinbefore set forth as
10 being used by the plaintiff, or from so affixing or applying, or causing to be so affixed or applied, any of the trade-marks or labels hereinbefore described and set forth, as being used by the defendants in imitation of your orator's said trade-marks or labels, or from so affixing or applying, or causing to be so affixed or applied, any trade-marks or labels whatever, in imitation of your orator's trade-marks and labels, and from putting up, selling, or offering for

sale, any article of medicine in similitude of your orator's said medicine, in bottles, like or similar to your orator's said bottles, or from advertising, offering for sale, shipment, or supply, or from pretending to sell, ship, or supply, any article of medicine in similitude of your orator's said medicines, with the same or any similar name, or the same or any similar trade-marks or labels, or bottles, or packages as your orator's.

And that said defendants show cause why they, their attorneys, solicitors, counselors, clerks, servants, and agents, and each of them, be restrained as aforesaid during the pendency of this suit.

And thus your orators have such other and further relief as the nature of this case may require and to your honors may seem meet.

May it please your honors to grant unto your orator a writ of subpœna, directed to said defendants, commanding them and each of them at a certain time, and under a certain penalty therein to be named, to appear before your honors in this honorable court, and there to answer unto this bill of complaint, and to do and receive what to your honors shall seem meet in the premises.

And your orator will ever pray, &c.

THE MANHATTAN MEDICINE COMPANY,
By B. T. BARRETT, *President.*

M. M. BUTLER, *of Counsel for Plaintiff.*
CHASE, BESTOW & HOLT, *Plaintiff's Solicitors.*

11 UNITED STATES OF AMERICA,
Southern District of New York, ss:

At the city of New York in the county and State of New York, in said district, this 14th day of May, A. D. 1875, personally appeared Byron S. Barrett, who signs the foregoing bill and makes oath that he is the president of the said Manhattan Medicine Company; that he has read the foregoing bill and understands the same and the contents thereof, and that all the matters stated of his own knowledge are true, and as to all other matters therein stated he verily believes them to be true.

Before me,
[L. S.] JOHN A. SHIELDS,
U. S. Com. of Southern District of New York.

Whereupon the following subpœna in chancery issued, to wit:

MAINE DISTRICT,
First Circuit, ss:

The President of the United States of America, to Nathan Wood and John T. Wood, who compose the firm of Nathan Wood & Son, both of the city of Portland, in the State of Maine, and both citizens of said State of Maine, greeting:

For certain causes offered before the circuit court of the United States, for the district and circuit aforesaid, as a court of chancery—

We command and strictly enjoin you, laying all other matters aside, and notwithstanding any excuse, that you personally appear before the said circuit court, to be held in Portland in said district, on the first Monday of July next, at ten o'clock in the forenoon, to answer concerning those things which then and there may be objected against you by The Manhattan Medicine Company, of the city of New
12 York, a corporation duly created and existing under the laws of the State of New York, and legally a citizen of the State of

New York, complainants in equity, as will more fully appear by their bill of complaint, filed May 20, 1875, and to do further, and receive that which said court shall do and order in this behalf.

And this you are in no wise to omit. And have you there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the United States of America, at Portland, aforesaid, this twentieth day of May, in the year of our Lord one thousand eight hundred and seventy-five.

[L. S.] GEORGE F. EMERY, *Clerk.*

RULE 12.—The defendants are to enter their appearance in the suit in the clerk's office, on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso.

Which is returned with the following endorsement, viz:

UNITED STATES OF AMERICA,
Maine District, ss:

MAY 20, A. D. 1875.

I have this day served the within precept upon the within-named Nathan Wood by delivering to him in hand a true and attested copy of the same. I also made diligent inquiry for the within-named John T. Wood, for the purpose of making service upon him, and learn that he is temporarily absent from this district; also visited his last and usual place of abode in Portland, and found no person with whom I could leave a copy of this precept occupying the same.

EDWARD H. WILSON,
Deputy U. S. Marshal, District of Maine.

Fees: Service, $2; trav. 1 m., .06; copy, 1.00—$3.06.

13 Said case was duly entered in court, at April term, A. D. 1875; and on the tenth day of July, next ensuing, William Henry Clifford, of counsel, entered his appearance for the defendant and filed the following

Answer.

United States circuit court, district of Maine, in equity.

MANHATTAN MEDICINE COMPANY }
vs.
NATHAN WOOD ET AL. }

To the judges of the circuit court of the United States within and for the district of Maine:

The answer of Nathan Wood and John T. Wood to the bill of complaint of the Manhattan Medicine Company.

These defendants, reserving unto themselves all manner of exception to the errors in the said bill of complaint, for answer thereto, say as follows:

That as to the existence of the said company as a corporation, or concerning the time in which said company has been in the manufacture of the said Atwood's Bitters, these defendants are ignorant; but they are informed and believe that the Manhattan Medicine Company, within

a few months from the filing of their said bill of complaint, purchased of Noyes, Manning & Co., of Mystic, Connecticut, and of certain parties in Georgetown, Massachusetts, to wit: one Carter, one L. H. Bateman, and one Will Dorman, all the right which the said parties had in the preparation and to the preparation of the said Atwood's Bitters.

And these defendants are informed and believe that the said assignors, to wit, Noyes, Manning & Co., Carter, Bateman & Dorman, did not hold or possess the exclusive right to the manufacture of the said Atwood's Bitters, and did not possess any exclusive right at all
14 to the same, neither did they possess any exclusive right to any trade-ma*de*, label, or wrapper, consisting of a glass bottle with panel-shaped sides with the raised words and letters "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.," blown in the glass; neither did they possess any exclusive right to the preparation of said medicine in a liquid form; or to a light yellow printed label pasted to said bottle, upon which were the words, "Atwood's Vegetable Physical Jaundice Bitters." Neither did they possess any exclusive right to the following words as alleged in said bill of complaint, to wit, and alleged to be printed upon said label, or said words in combination with the words, "Atwood's Vegetable Physical Jaundice Bitters," the said words being as follows:

"This is an effectual cure for jaundice, headache, dyspepsia, worms, dizziness, loss of appetite, darting pains, colds and fever. It cleanses the blood from humors and moistens the skin. It is also good for liver complaints, strangury, dropsy, croup, and phthisic.

"Dose for an adult, from half a tablespoonful to half a wine-glassful, according to the strength of the patient.

"DIRECTIONS.—For jaundice or headache, it should be taken every morning, half an hour before eating. For dyspeptic complaints, spitting up food, and distress at the stomach, take a teaspoonful immediately after eating. For worms, or any sudden attack of pain in the stomach, it should be taken immediately. For fevers, it should be taken in large doses, once in four hours, while it operates smartly as physic. At the same time, take a good sweat—then continue a little bitters every morning, sufficient to keep the bowels in good order. For liver complaints, it should be taken the same as in dyspepsia, at the same time applying one of Atwood's Strengthening Plasters between the shoulders, and wherever the patient has the most pain, which generally effects a cure in a short time, if administered in
15 season. It is safe in all cases, and meets the approbation of all who have had an opportunity of using it.

"Manufactured by Moses Atwood, Georgetown, Mass., and sold by his agents throughout the United States."

And these defendants are informed and believe that it is not true, and also deny, that the said Noyes, Manning & Co., Carter, Bateman and Dorman had the exclusive right of a label such as is above described when pasted upon the outside of a package containing one-half dozen of the bottles made and labeled as described above. But these defendants are informed and believe that for many years prior to 1875, in which year the complainants purchased an alleged right to put up the said Atwood's Bitters of said Noyes, Manning & Co., said Carter, Bateman and Dorman, that the twelve panel bottle, the yellow label, the words Atwood's Bitters, together with the other words alleged to be printed on said label of complainants, were in public and common use by a large number of manufacturers; and these defendants are informed and believe, and allege, that although the said

Manhattan Medicine Co. may have purchased the rights, if any, as aforesaid, of the said Noyes, Manning & Co., Carter, Bateman and Dorman, yet they have not purchased, and do not now own, an exclusive right or the entire right to the said bottle and label and words, or either of them; because the said assignors named were not exclusive proprietors of the same, and could not, therefore, sell and dispose of an exclusive right to the same. But these defendants allege, on the contrary, that various other persons, previous to the date of the alleged purchase by these complainants of the right to the said label and trade-mark, had and exercised the right to the use of the same, to wit, the said label, bottle, and trade-mark, and still continue so to do.

And these defendants, further answering, say that the complainants have not the exclusive right to the use of the paneled bottle
16 with the words blown in the glass of the same, or the yellow label with the words printed thereon, as described.

Further answering, these defendants say, that they deny, upon information and belief, that Moses Atwood, formerly of Georgetown, Massachusetts, first invented and put up for sale the medicine referred to in the bill of complaint; or that the same has ever since been made and sold in the name, manner, with the trade-marks, labels and description, as set forth in said bill of complaint. But, to the contrary, they allege, upon information and belief, that the said medicine was first put up by one Moses F. Atwood, at Georgetown, Mass., in connection with one L. H. Bateman, and that the form of bottle then used by them was not a paneled bottle, but a smooth round bottle without panels; that subsequently the said Bateman put up the medicine in a rectangular bottle; that the said round bottle had no words blown upon the glass, and that said rectangular bottle did have certain words blown in the glass thereof.

And these defendants, further answering, say that neither the paneled bottle, the letters blown in the glass of the same, or the yellow label having the words "Atwood's Bitters," have ever constituted the label trade-mark, or character by which an article of medicine was known and designated, and distinguished as the special manufacture of any particular manufacturer.

And these defendants deny that the said paneled bottle, having words blown in the glass, as described in the bill of complaint, and pasted thereto a yellow label, having printed thereon the words "Atwood's Bitters," are of any value as designating or being the trade-mark of any particular and uniform kind of medicine; but to the contrary they say, that said bitters, or what purported to be said bitters, have for years been put up under a variety of labels, in different kinds of bottles, and under labels of different colors.

17 And these defendants are informed and believe that Moses Atwood first used a white label, and a round bottle having no panels or blown letters, and that he used the same at Nashua, in the district of New Hampshire, and that his preparation was distinguished by that kind of label, and for several years.

And these defendants, further answering, say, upon information and belief, that Moses F. Atwood, and not Moses Atwood, first obtained the formula for said medicine from some physician to these respondents unknown, and prepared the said medicine according to said formula, and not according to any invention of himself or said Moses, and said medicines so put up by Moses F. Atwood then began to be called Atwood's Bitters, and he began the preparation of the same with one L. H. Bateman, of Georgetown, Mass., and that they finally adopted a

bottle having panels or sides and a yellow label with the words Atwood's Bitters, Georgetown, Mass., and for a long time, but how long the defendants do not know, continued selling the medicine under such a label and in such a bottle.

And these defendants further say that Nathan Wood, in May, A. D. 1861, purchased of said Moses F. Atwood the recipe for said medicine and the right of using the said bottle and label, and hath a right to use the same and no person has ever pretended to interrupt the use by him of said bottle till the present suit by these complainants against him.

And these defendants, further answering, say that L. F. Atwood, the brother of Moses Atwood, also had a right to use the said label and bottle, and that he sold a right under the said right to H. H. Hay, of Portland, Maine, who still uses the same on the bottles and with the said medicine.

And these defendants, further answering, say that they have been in the practice of preparing the said medicine under the receipt bought of Moses F. Atwood for a period of fourteen years, and that they
18 have spent large sums of money in advertising the said medicine, and in creating a market for the same, and that the bitters sold by these respondents are known by the name of Wood's Bitters, or Atwood's Bitters, prepared by Nathan Wood.

And these defendants deny that the paneled bottle, the word "Atwood's Bitters," or a yellow label constitute a trade-mark by which the medicine put up by these complainants, if any, has become well known throughout the United States and Canadas. But they say that the said medicine is bought and sold in the market, by the name of place of business of the manufactnrer; that certain medicines of this kind have for years been known by the name of "Carter's Bitters," another class by the name of "Bateman's Bitters," and another class by the name of "Mystic;" another by the name of H. H. Hay, and another by the name of the principal defendant, for many years.

Further answering, these defendants say that the right to several of the States of the United States, to wit, Maine, New Hampshire, and several Western States, in the use of the said label and trade-mark, if any, was not embraced in the right which the assignors of the complainants had exercised, but were excluded therefrom; and, further, they say that the assignors of the complainants, and these complainants, never obtained any right at all from Moses F. Atwood, who, together with one L. H. Bateman, was the first to put up the medicine for public sale, and to use the fluted bottle with the yellow label, and the letters blown in the glass, as these defendants are informed and believe.

And these defendants deny that they compound an article inferior in quality, but aver that their medicine is compounded under the said recipe obtained from the originator of the said medicine, and, upon information and belief, state that the said yellow label, the paneled bottle, and the words Atwood's Bitters, were for some years used by one Carter, at Georgetown, Mass. (from whom the complainants de-
19 rive a portion of their alleged exclusive right of their said trademark), to deceive the public, and were used to cover an inferior and degraded article, although said article purported to be Atwood's Bitters was so labeled, and had the words "Atwood's Bitters" blown into the bottle and on the label, and in all external appearances identical with the packages and bottles containing genuine bitters, and that said bitters were for a long time sold in the market under such marks by said Carter.

And these defendants further deny that they have interferred with the business of the complainant, but, to the contrary, they aver that for many years prior to the purchase of the alleged right by the complainants, they, the defendants, were in the business of putting up the said medicine, and had created a sale for the same by their own advertising, at their own expense, and that the various persons from whom the complainants obtained their alleged trade-mark never had any market or sales to any amount within the territory in which the defendants have been accustomed to sell their goods.

And these defendants deny that their article, by reason of any marks or labels on the bottles or packages containing the same, is sold as and for the medicine made and sold by the complainant, if any; but the defendants are informed and believe that the said complainants do not compound the said medicine, and that it is not known in the market by the name of the complainants, but by the names of the different manufacturers thereof.

And these defendants, further answering, deny that the words "Atwood's Vegetable Physical Jaundice Bitters" constitute a trade-mark or name which can be exclusively purchased or appropriated by any one, because the same has for many years been publicly used by a great number of persons, so that any one has a right to the use of the said words who has a knowledge of the method and ingredients
20 in the preparation of the medicine, and has been so generally used to that extent that no one can now secure to himself the exclusive right to the use of the said words; that if any exclusive right ever existed to the alleged trade-marks, such as used by the complainants, it was held by Moses F. Atwood and L. H. Bateman, at Georgetown, Mass., from the former of whom these defendants obtained their rights.

These defendants, further answering, say that in 1857 one Carter, from whom these complainants claim a portion of their right, brought a bill in equity against L. H. Bateman, in the supreme judicial court of the State of Massachusetts, sitting in the county of Essex, setting up an exclusive right to the use of said trade-mark in said Carter. And these defendants say that the said L. H. Bateman was the same person as the one hereinbefore mentioned as having been engaged with Moses F. Atwood, the first to prepare the said medicine and labels jointly with said Bateman.

And these defendants aver that in said cause it was decided that said Carter had not an exclusive right to the yellow label and the words Atwood's Vegetable Physical Jaundice Bitters, and judgment was entered for Bateman and the bill was dismissed, to proof of which these defendants crave leave to refer.

And these defendants, further answering, claim that they have the full right to the use of the said bottle, words, labels, and letters, and that the complainants have acknowledged the same, and that those from whom the complainant purchased their alleged right have acquiesced in the rights of the defendants for many years anterior to the date of the complainants' purchase.

And these defendants, further answering, deny the alleged exclusive right of the complainants in a yellow label, having thereon the words "Atwood's Bitters," having thereon certain other descriptive words, or
21 the said words "Atwood's Bitters," however affixed or applied to a label or bottle, or to the form of said bottle as described in the bill of complaint; but they say that the words "Atwood's Bitters" are also, and have for a long time been, a name designating another medi-

cine than the one compounded by the complainants, and upon which they affix the said words and labels. And, furthermore, they say that the paneled bottle has been used to contain other medicines than the one alleged to be compounded by the complainants, and that even though the said complainants had for any period of time used the said label, words, and bottle to inclose the said medicine called Atwood's Bitters, they could have no exclusive right to the said words, label, and bottle, because the same has been commonly used in the preparation and for the purpose of covering and containing other medicines of a different character, and that the same do not constitute any distinguishing mark by which the so-called Atwood's Bitters are or can be known.

Wherefore the said defendants pray that the prayers of the said bill of complaint may be denied, and aver that the statements made in the said prayers are untrue.

And these defendants say that all of the matters and things herein above alleged these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray hence to be dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

NATHAN WOOD.

WILLIAM HENRY CLIFFORD, *of Counsel.*

DISTRICT OF MAINE,
City of Portland, ss:

JULY 10, A. D. 1875.

Then personally appeared the above named Nathan Wood and subscribed the answer, and made oath that the allegations of the
22 same are true and correct, except so far as made upon information and belief, and that as to those he believes them to be true.

Before me—

JAMES D. FESSENDEN,
Register in Bankruptcy.

And on the twenty-ninth day of September, A. D. 1875, is filed the following:

Replication.

Circuit court of the United States for the district of Maine.

THE MANHATTAN MEDICINE COMPANY } In equity. Complainant's
vs. } replication.
NATHAN WOOD AND JOHN S. WOOD. }

The replication of the Manhattan Medicine Company, &c., complainant, to the answer of Nathan Wood and John Wood, defendants.

The repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication saith, that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this replient is, and will

be, ready to aver and prove as this honorable court shall direct, and humbly prays as in its said bill it hath already prayed.

CHASE, BESTOW & HOLT,
Complainant's Solicitors.

23 Said cause is continued thence from term to term until April term, A. D. 1877; and now, to wit, on the sixteenth day of July, A. D. 1877, the parties agree that the testimony in said cause is closed and publication thereof is ordered, as follows:

Evidence for complainant.

Circuit court of the United States for the district of Maine. In equity

THE MANHATTAN MEDICINE COMPANY
vs.
NATHAN WOOD ET AL.

There were introduced in evidence by the complainant during the taking of said depositions, exhibits marked "Complainant's Exhibit A, February 14, 1876; "Complainant's Exhibit B, February 14, 1876"; "Complainant's Exhibit C, February 19, 1876;" and also exhibits hereto annexed pursuant to the stipulation of respective parties, being—

1st. Bill of sale or assignment of the heirs and representatives of L. H. Bateman to John F. Henry, Curran & Co., dated the first of day Januany, 1875.

2d. Also assignment of the above bill of sale by John F. Henry, Curran & Co. to said Manhattan Medicine Company, dated March 18, 1875.

3d. Also bill of sale of Henry B. Noyes and Francis M. Manning, composing the firm of H. B. Noyes & Co., to said Manhattan Medicine Company, dated April 1, 1875.

4th. Bill of sale from Benjamin S. Dodge to said Manhattan Medicine Company, dated the 30th day of March, 1875.

5th. Also bill of sale from Benjamin S. Dodge to William B. Dorman, dated April 17, 1873.

24 Also assignment and bill of sale by said William B. Dorman to said Manhattan Medicine Company, dated March 30, 1875.

7th. Also bill of sale and assignment by M. Frank F. Carter to Luther F. Carter, dated March 20, 1875.

8th. Also a bill of sale and assignment from said Luther F. Carter to said Manhattan Medicine Company, dated April 19, 1875.

9th. Also a bill of sale or assignment by Charles L. Carter and others to said Manhattan Medicine Company, dated April 12, 1875.

10th. Also articles of association or incorporation of said Manhattan Medicine Company, dated the 21st day of September, 1874, together with the several certificates and acknowledgments thereon, and memoranda of the filing of the same.

11th. Also records of the meetings of the stockholders and trustees of said Manhattan Medicine Company, held October 12, 1874, which said last named eleven exhibits I have carefully compared with the original and certify the same to be true, correct, and complete copies of all of said originals; and I further certify that, in taking said depositions, that I took down therewith at the time, in the presence and at the request of respective counsel aforesaid, their several stipu-

lations and agreements, and all the same so taken I herewith return to said court, directed and sealed by me. Dated August 3, 1871.

WILLIAM J. MANN,
Special Examiner.

Testimony taken on the part of the complainant, under the sixty-seventh rule of practice for courts of equity of the United
25 States, as amended, before William J. Mann, special examiner, at his office 120 Broadway, New York City, February 14, 1876.

Present, Chase, Bestow & Holt, esqs., counsel for complainant; W. H. Clifford, esq., counsel for defendants.

Deposition of Charles E. Parker.

CHARLES E. PARKER, produced and duly sworn as a witness on the part of the complainant, deposes and says, in answer to interrogatories propounded by Philo Chase, counsel for the complainant, as follows:

Ques. Where do your reside?

Ans. City of Brooklyn, New York.

Ques. What is your occupation?

Ans. I am a druggist. I am a clerk and salesman in the house of John F. Henry, Curran & Co.

Ques. What is your age?

Ans. Thirty-eight.

Ques. Are you acquainted with the plaintiff in this suit, the Manhattan Medicine Co.?

Ans. Yes, sir.

Ques. How long have you been acquainted with the company; since its organization?

Ans. Yes, sir.

Ques. Are you acquainted with the defendants, Nathan Wood and John T. Wood?

Ans. I am not personally acquainted with them, except meeting them in their store. I met Mr. Nathan Wood there, and another gentleman whose name I do not know.

Ques. When did you meet either of the defendants, and where?

26 Ans. I met them in their store last May—in their store in Portland.

Ques. Do you say that you then met one or both of the defendants?

Ans. I saw Nathan Wood and another gentleman; I am not sure whether I saw the other defendant.

Ques. Did you then have a conversation with Nathan Wood in respect to an article of medicine called Atwood's Vegetable Physical Jaundice Bitters; or in short, Atwood's Bitters?

Ans. Yes, sir.

Ques. Did Nathan Wood then show you samples of said article as put up and prepared for sale by him?

Ans. Yes, sir.

Ques. Did you then purchase of said Wood some of said article?

Ans. Yes, sir.

Ques. How much?

Ans. I am not sure now whether it was half a dozen or a dozen. It was either three each of two kinds or six each of two kinds.

Ques. Explain what you mean by two kinds.

Ans. Mr. Wood showed me two kinds of the Atwood's Bitters, one

be, ready to aver and prove as this honorable court shall direct, and humbly prays as in its said bill it hath already prayed.

CHASE, BESTOW & HOLT,
Complainant's Solicitors.

23 Said cause is continued thence from term to term until April term, A. D. 1877; and now, to wit, on the sixteenth day of July, A. D. 1877, the parties agree that the testimony in said cause is closed and publication thereof is ordered, as follows:

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Circuit court of the United States for the district of Maine. In equity

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vs.
NATHAN WOOD ET AL.

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lations and agreements, and all the same so taken I herewith return to said court, directed and sealed by me. Dated August 3, 1871.

WILLIAM J. MANN,
Special Examiner.

Testimony taken on the part of the complainant, under the sixty-seventh rule of practice for courts of equity of the United
25 States, as amended, before William J. Mann, special examiner, at his office 120 Broadway, New York City, February 14, 1876.

Present, Chase, Bestow & Holt, esqs., counsel for complainant; W. H. Clifford, esq., counsel for defendants.

Deposition of Charles E. Parker.

CHARLES E. PARKER, produced and duly sworn as a witness on the part of the complainant, deposes and says, in answer to interrogatories propounded by Philo Chase, counsel for the complainant, as follows:

Ques. Where do your reside?

Ans. City of Brooklyn, New York.

Ques. What is your occupation?

Ans. I am a druggist. I am a clerk and salesman in the house of John F. Henry, Curran & Co.

Ques. What is your age?

Ans. Thirty-eight.

Ques. Are you acquainted with the plaintiff in this suit, the Manhattan Medicine Co.?

Ans. Yes, sir.

Ques. How long have you been acquainted with the company; since its organization?

Ans. Yes, sir.

Ques. Are you acquainted with the defendants, Nathan Wood and John T. Wood?

Ans. I am not personally acquainted with them, except meeting them in their store. I met Mr. Nathan Wood there, and another gentleman whose name I do not know.

Ques. When did you meet either of the defendants, and where?

26 Ans. I met them in their store last May—in their store in Portland.

Ques. Do you say that you then met one or both of the defendants?

Ans. I saw Nathan Wood and another gentleman; I am not sure whether I saw the other defendant.

Ques. Did you then have a conversation with Nathan Wood in respect to an article of medicine called Atwood's Vegetable Physical Jaundice Bitters; or in short, Atwood's Bitters?

Ans. Yes, sir.

Ques. Did Nathan Wood then show you samples of said article as put up and prepared for sale by him?

Ans. Yes, sir.

Ques. Did you then purchase of said Wood some of said article?

Ans. Yes, sir.

Ques. How much?

Ans. I am not sure now whether it was half a dozen or a dozen. It was either three each of two kinds or six each of two kinds.

Ques. Explain what you mean by two kinds.

Ans. Mr. Wood showed me two kinds of the Atwood's Bitters, one

of which, in a round bottle, he told me was sold almost exclusively in Maine. The other is put up in twelve-sided bottles; it is sold principally in New England; I mean Massachusetts and Western New England.

Ques. How much of the twelve-sided bottle kind did you see at Wood's store?

Ans. I did not notice the stock particularly.

Ques. Did Nathan Wood tell you how much he had on hand?

Ans. No, sir.

27 Ques. What did he say, if anything, in respect to the amount of the twelve-sided kind that Nathan Wood & Son had sold?

Ans. I had no special conversation with him on the subject. He remarked that he had orders for some of the twelve-sided kind from Thornton.

Ques. Did he say he had filled the order, or was going to?

Ans. No, sir; there was nothing said about it.

Ques. Was the twelve-sided kind you refer to like the kind made and sold by the complainant?

(Objected to as matter of law.)

Ans. I never compared the two together. I mean that I never compared them together to see if the labels were exactly the same—if they were fac-similes.

Ques. Are you acquainted with said article called Atwood's Vegetable Physical Jaundice Bitters made and sold by the complainant?

Ans. Yes, sir.

Ques. How long have you been acquainted with them?

Ans. Upwards of seven years.

Ques. In what way?

Ans. As a salesman.

Ques. Do you mean to say that you have been selling the article for seven years?

Ans. Yes, sir.

Ques. Where, and how?

Ans. As a salesman of the firm previously of John F. Henry, latterly John F. Henry, Curran & Co.

Ques. State whether the bottle now shown you is a sample bottle of said article, as now made, put up, and sold by the complainant.

Ans. Yes, sir. I should say it was.

(Bottle put in evidence by the complainant, and marked "Complainant's Exhibit A, February 16th, 1876, W. J. M.")

28 Ques. Were the twelve-sided bottle kind which you bought of the defendants similar in appearance, in respect to form of bottle and label, to said Plaintiff's Exhibit A?

(Same objections as before.)

Ans. Yes, sir.

Ques. State whether you marked one of the twelve-sided kind of the bottles which you bought of the defendants with your initials, as an exhibit to be used in this cause.

Ans. I did.

Ques. When?

Ans. A few days after returning in May; I do not know the exact date.

Ques. Do you say some time in May?

Ans. It was either in May or July. After my trip in May, I went West for two months.

Ques. What initials did you put upon the bottle?

Ans. C. E. P.

Ques. Was that the only bottle of the twelve-sided kind which you bought of the defendants, which you marked with you initials?

Ans. Yes, sir.

(Admitted by respective counsel that bottle marked C. E. P., now on file in the office of the clerk of this court, in Portland, is the bottle referred to by the witness. W. J. M., sp. ex.)

Ques. State whether the bottle of Atwood's Bitters now shown you and marked with your initials C. E. P., is one of the round bottle kind which you purchased of the defendants last May, as above stated?

Ans. It is.

(Bottle marked Complainant's Exhibit B, February 14, 1876. Complainant puts the bottle in evidence.)

Ques. State how the complainant's article is generally called for by customers; that is, by what name.

Ans. Either as Atwood's Jaundice Bitters, or Atwood's Bitters, Octagon.

29 Cross-examination by Mr. CLIFFORD:

Ques. You are employed by the complainants, are you not?

Ans. I am not employed by them.

Ques. Who compose the Manhattan Medicine Company, if you know?

(Objected to on the ground that there is better evidence of the fact.)

Ans. I have no positive knowledge of any except my own. I own five shares myself.

Ques. Are John F. Henry, Curran & Co., members of the Manhattan Company?

Ans. I am unable to say.

Ques. Do you, or not, know whether they are members of that company, have any interest therein, or are in any way connected with its business?

Ans. I do not.

Ques. When you visited the store of Nathan Wood, in Portland, will you describe the other person whom you state was present? Say if he was young or old.

Ans. He was not an old man; I should say a middle-aged man.

Ques. How many times did you call at Nathan Wood's store?

Ans. Twice.

Ques. How much time intervened between the two calls?

Ans. I don't remember whether I called at once after my first visit or the morning following.

Ques. What was your object in making the visit on him, and by whom, if any one, were you sent? State fully.

Ans. My object in visiting him was to purchase from him some of the twelve-sided bottles of Atwood's Bitters, and I went at the suggestion of my employers.

30 Ques. Why did you purchase some of the twelve-sided bottles?

Ans. So as to find out whether it was counterfeit on the Atwood's Bitters as sold by the Manhattan Company.

Ques. Then you were sent by your employer to purchase some of Wood's article of this kind for the purpose of evidence, were you not?

Ans. There was no motive given. I went at their suggestion.

Ques. Will you state that you did not know for what purpose you were sent to buy the bottles at Wood's store?

Ans. As I stated before, I bought them in order to find out whether

they were a counterfeit on the Atwood's Bitters as owned by the Manhattan Medicine Company.

Ques. Did you know then that the company proposed bringing suit against Wood?

Ans. Not positively.

Ques. Who told you that the company had any intention of suing Wood?

(Objected to as immaterial and hearsay.)

Ans. I don't remember; I only heard it in a general way in the store.

Ques. At your first call upon Wood, of which you have spoken, do you remember what kind of bottles you obtained from him?

Ans. I obtained either three or six of the kind marked Exhibit B. I also obtained another round bottle about the size of Exhibit A, but all round.

Ques. Did you pay for these bottles thus first obtained?

Ans. Yes, sir.

Ques. Why did you go the second time to the store?

Ans. To exchange the round bottle, similar in style to Exhibit A, that is, the shorter and thicker bottles, for the twelve-sided bottle.

31 Ques. Will you give me the language you used, as nearly as you can, when you went into Wood's store the first time and bought the bitters? I refer more particularly to what you said when you made known your wish to purchase.

Ans. I think I merely asked him for some Atwood's Bitters, and asked him what they were for. This is all of the conversation that I remember.

Ques. Will you give me the language you used, as well as you can; in the same particular, when you called the second time to make the exchange of which you have spoken?

Ans. I merely requested him to exchange the round bottle, as referred to before, for the twelve-sided kind, which he told me sold mainly in Massachusetts and Western New England.

Ques. Did he or not say in substance that he did not sell that kind of bottle?

Ans. I don't remember that he said so.

Ques. Do you testify that he did not say so, or some one there, or only speak of your not being able to remember?

Ans. I do not say that he did not say so. I say that I do not remember it.

Ques. Did you pay anything for the twelve-sided bottle, which you say you took at the second call?

Ans. No, sir.

Ques. Did Wood know who you were? Did you make yourself or your errand, as sent by your employer, known to him?

Ans. Mr. Wood did not know me. I did not make my errand known. I only went on the suggestion of my employers.

Ques. Can you swear that the bottle you attached to your affidavit in the preliminary motion in this case is the one you got from Wood at your second visit?

Ans. Yes, sir.

32 Ques. How can you do so, and how identify it as the same?

Ans. By my initials, C. E. P., on the label.

Ques. Can you say positively when you put your initials on that label?

Ans. I don't remember that now.

Ques. How long after you got the bottle was it, if you can remember?

Ans. It was either a few days after or two or three months after.

Ques. Can you say which?

Ans. Not at present.

Ques. Did you take the bottle with you; or, if nay, where did you leave it while it remained unmarked?

Ans. I took them with me. I did not take them with me out West.

Ques. Where were they while you were out West, if you can say?

Ans. My recollection is that I put my initials on before I went West; if not, the bottles were in the office of Chase, Bestow & Holt.

Ques. Is your recollection now any clearer as to when you affixed your initials than it was a few minutes since?

Ans. No, sir.

Ques. Now, if you did not put your initials on the bottle until you got back from the West, how are you able to swear that you put them on the same bottle you got from Nathan Wood?

Ans. I could not do that.

Ques. Could you swear at all, then, since you are not certain when you affixed your initials, that you positively know the bottle now marked with your initials to be the one you got at Nathan Wood's?

33 Ans. I can swear that at the time I put my initials on the bottle I was sure it was the identical bottle I got at Nathan Wood's.

Ques. If it was when you came from the West, after two months' absence, were you positive about it then when you had not seen it for that time?

(Objected to as already answered.)

Ans. I was positive when I signed it that it was the identical bottle, whenever it was.

Ques. Did you see any bottles of Atwood's Bitters in the store but the one you received; I mean on your second call?

Ans. I think they were taken from a case.

Ques. (Question repeated.)

Ans. I think I did. I think I saw him take them from a case; I refer to the twelve-sided bottles.

Ques. Do you have any distinct recollection about this matter, of where he took the bottles from on the second call?

Ans. No distinct recollection, only an impression.

Ques. What other kind of bottles do the Manhattan Company use in which to put up this medicine, except the one you have marked Exhbit H?

(Objected to as immaterial.)

Ans. No other that I know of.

Ques. Is there not a flat bottle used by them sometimes?

Ans. There is an Atwood's Bitters put up in flat bottles, they own the trade-mark, but I have always understood it to be a distinct article; another article altogether.

Ques. Is it a Physical Jaundice Bitter?

Ans. I don't remember whether it goes by that name.

Ques. Is the label yellow?

Ans. I think so.

Ques. How long have they owned this; from whom did they get it, and what are the chief words on the label as well as you can remember; whether have you or not sold these bitters?

34 (Objected to as irrelevant and immaterial.)

Ans. I do not know how long they have owned it. I do not know from whom they got it. I do not remember the chief words on the label. I have sold them.

Ques. Have you ever heard from whom they obtained the trade-marks? If yea, who told you?

(Objected to as irrelevant, immaterial, and hearsay.)

Ans. I was not told by any one; only heard it as a matter of talk in the store of J. F. Henry, Curran & Co.

Ques. What was it you heard in that store as to whom it was obtained from?

(Same objection.)

Ans. I don't remember what I heard.

Ques. Will you produce and attach to this deposition, one of those labels?

Ans. I am not able to do that.

Ques. Can you not obtain one and produce it here before the examiner to-morrow?

Ans. I don't know. I can buy a bottle, I suppose.

Redirect by Mr. CHASE:

Ques. To what persons did you show the twelve-sided bottles which you got of the Woods?

Ans. I showed them to different members of the firm, when I returned, John F. Henry, Theodore Curran, Henry E. Bowen, &c.

Ques. Did you show them to Mr. Emmons, secretary.

Ans. I think Mr. Emmonds saw them.

Ques. Did Mr. Barrett, the president of the company, see them?

Ans. I think he did.

Ques. And among these twelve-sided bottles which you showed to the persons above named, was there the twelve-sided bottle which you marked with your initials?

35 Ans. There was.

Ques. State whether or not these twelve-sided bottles which you got of the defendants were counterfeits or imitations of the complainant's article in question.

(Objected to, being one of the questions at issue in the case, and for the court.)

Ans. I should say they were.

Ques. State, whether, when you exchanged the shorter round-sided bottle for the twelve-sided imitation or counterfeit kind, Wood told you they sold this imitation twelve-sided kind for the same price as the round-sided kind which you gave in exchange.

(Objected, same as above, and as leading.)

Ans. He told me there would be no extra charge; that the price was the same. I offered him the difference, if any.

Ques. Did you compare the twelve-sided bottles which you got of the defendants, with the complainant's article in question, by putting the bottles side by side?

Ans. I have seen them side by side. I did not do it with a view to criticise them.

Ques. And when you saw the bottles side by side did you observe the difference, whatever there was, between the respective bottles and labels?

Ans. I did not.

Ques. What, if anything, did Nathan Wood say to you in respect to their, the defendants, putting up the twelve-sided bottle kind for one market, and the round-bottle kind for another market?

(Objected to as new matter, and leading.)

Ans. He told me, as I said before, that the round bottles sold almost exclusively in Maine, and that the other kind put up in the twelve-sided bottles sold mainly in Massachusetts and the western part of New England.

Ques. (Question repeated.)

36 Ans. He told me that he put up the twelve-sided bottle for Massachusetts and the western part of New England, and the round bottle for the Maine market, but that the bitters were essentially the same.

Ques. State whether or not, when you bought the twelve-sided bottles of the defendants, you were familiar enough with the article, as made and sold by the complainant, to know that the twelve-sided bottles bought of the defendants were or were not the complainant's bottles.

(Objected to as immaterial, and leading.)

Ans. Yes, sir; I think I was.

Ques. Were, or were not, the twelve-sided bottles that you bought of the defendants, plaintiff's article?

(Objected to as being one of the questions at issue.)

Ans. They were not plaintiff's article, to the best of my knowledge.

Cross-examination resumed:

Ques. Do you, when you speak of the article, mean to say anything about the character of the contents of the bottle?

Ans. Not at all; I only mean the label and the bottle.

Ques. Does, or not, your answer to the last question of the direct resumed apply to both kinds of bottles you got of defendant?

Ans. It refers to the twelve-sided, and might refer to the other.

CHARLES E. PARKER.

37 *Deposition of Asa Emmons.*

FEBRUARY 15, 1876.

Parties present by their respective counsel: Philo Chase, for complainants; Wm. Henry Clifford, for respondents.

ASA EMMONS, a witness called by the complainant and duly sworn, on oath testified as follows, in answer to questions propounded by PHILO CHASE, counsel for the complainant.

Questions by complainants' solicitors.

Ques. Where do you reside?

Ans. Newark, New Jersey.

Ques. What is your occupation?

Ans. I am a bookkeeper for John F. Henry, Curran & Co.; keep the commission accounts, at No. 9 College Place, in the city of New York.

Ques. Are you the treasurer and secretary of the Manhattan Medicine Company, the complainant in this suit?

Ans. Yes.

Ques. How long have you been secretary of the company?

Ans. Since March 26, 1875.

Ques. How long have you been treasurer of the company?

Ans. Since October 12, 1874.

Ques. When was the complainant organized as a corporation?

Ans. In 1874—about September 23d.

Ques. When did the company hold its first meeting as a corporation?

Ans. October 12, 1874.

Ques. For what purpose was the company organized?

38 Ans. For the purpose of carrying on the business of patent medicines.

Ques. Has the company ever since carried on the proprietary medicine business; ever since its organization?

Ans. Yes.

Ques. State whether or not it has been a part of the business of the company to carry on the business of making and selling an article of medicine called Atwood's Vegetable Physical Jaundice Bitters.

Ans. It has.

Ques. Describe the bottle and labels now used by the complainant in putting up and selling said medicine?

Ans. Exhibit A, February 14, 1876, is a sample bottle and label as now used by the complainant in putting up and selling said medicine, and is the same that the company have always used in making and selling said medicine.

Ques. When did the company begin to make and sell this medicine in the form described?

Ans. To the best of my present recollection, about April, 1875.

Ques. State whether or not the complainant has an extensive sale for said article put up in the manner described.

Ans. It has.

Ques. To what parts is it sent and sold in?

Ans. I have no particular knowledge where it is sent, but J. F. Henry, Curran & Co., the general agents have the charge of that. The company's dealings are with the general agents.

Ques. Can you tell, without reference to the books of the company, about the amount of the company's sales of this article?

Ans. I cannot.

Ques. In a general way, are the sales large?

Ans. Yes; I consider them so.

39 FEBRUARY 16TH.

Met pursuant to adjournment.

Parties present by their respective attorneys.

Examination of Asa Emmons continued.

By complainant's solicitors.

Ques. Since the adjournment yesterday have you examined the company's books to see what the amount of sales of the article in question is?

Ans. I have. I find that the sales, up to February of this year, since April 1, 1874, have been about 550 gross.

Ques. What is the wholesale price?

Ans. Twenty-seven dollars per gross.

Ques. What is the retail price?

Ans. I do not know.

Ques. State whether or not there is a secret recipe or formula for making this article of Atwood's Bitters.

Ans. Yes; there is a recipe or formula for making it.

Ques. State whether the company have such recipe.

(Objected to as being secondary evidence.)

Ans. They have.

Ques. State whether or not the company owns such recipe.

(Same objection.)

Ans. It does.

Ques. State from whom the company obtained the recipe.

(Same objection.)

Ans. From John F. Henry, Curran & Co., Noyes & Co., Carter & Son, Dorman. Noyes & Co. live at Mystic Bridge, Conn.; the Carters, at Georgetown, Mass.; and Dorman, Wm. B., also at Georgetown.

Ques. From whom did Jno. F. Henry & Co. obtain the recipe, and for whom?

Ans. From the Bateman heirs.

40 Ques. State whether or not the company is the owner of the trade-marks and labels of said Atwood's Bitters, made and put up as Exhibit A, February 14, 1876.

(Objected to as secondary.)

Ans. It is.

Ques. State from whom the company obtained their title to said trade-marks and labels.

(Same objection.)

Ans. Noyes & Co., Carter & Son, Dorman, and Jno. F. Henry, Curran & Co.

Ques. From whom did J. F. Henry, Curran & Co., obtain their title to the said trade-marks and labels?

(Same objection.)

Ans. From the heirs of L. H. Bateman.

Ques. State whether or not the company have purchased the right to use the name of Moses Atwood in connection with said bitters.

(Same objection.)

Ans. I do not know except by reference to the papers.

Ques. State whether or not the complainant ever gave Nathan Wood & Son, the defendants, any right or permission to use said trade-marks or labels, or said twelve-sided bottle with the letters blown in the glass, or any part of the name of said bitters or trade-marks or labels, &c.

Ans. Not to my knowledge.

Ques. State whether the complainant has the exclusive right to use the name Atwood's Vegetable Physical Jaundice Bitters as a name for said bitters.

(Objected to as being a question for the court.)

Ans. I understand it so.

Ques. State whether the complainant has also the exclusive right to use said form of label and trade-marks and bottle, in connection with said bitters.

(Same objection as above.)

Ans. I understand it so.

41 The respective parties consent that examiner's copies of all papers offered in evidence, to wit:

A bill of sale or assignment of the heirs and representatives of L. H. Bateman to John F. Henry, Curran & Co., dated the 1st day of January, 1875;

Also the assignment of the above bill of sale by John F. Henry, Curran & Co. to the said Manhattan Medicine Co., dated March 18, 1875;

Also the bill of sale of Henry B. Noyes and Francis M. Manning, composing the firm of H. B. Noyes & Co., to said Manhattan Medicine Company, dated April 1, 1875;

Also a bill of sale from Benjamin S. Dodge to said Manhattan Medicine Company, dated the 30th day of March, 1875;

Also a bill of sale from Benjamin S. Dodge to William B. Dorman, dated April 17, 1873;

And also an assignment and bill of sale by said Wm. B. Dorman to said Manhattan Medicine Company, dated March 30, 1875;

Also a bill of sale and assignment by M. Frank Carter to Luther F. Carter, dated March 1, 1875;

Also bill of sale and assignment from said Luther F. Carter to said Manhattan Medicine Company, dated April 9, 1875;

Also a bill of sale or assignment by Charles L. Carter and others to said Manhattan Medicine Co., dated April 12, 1875;

To be admitted and used as competent evidence in this cause.

Said copies being attached hereto.

WILLIAM J. MANN,
Special Examiner.

And also that there be admitted and used as competent evidence, under the above stipulation, an examiner's copy of the articles of association or incorporation of said Manhattan Medicine Company, dated
42 the 21st day of September, 1874, together with the several certificates and acknowledgments thereon, and the memoranda of the filing of the same.

And also copies of the records of the meetings of the stockholders of said Manhattan Medicine Co., and of the trustees of said Manhattan Medicine Co., held Oct. 12, 1874.

WILLIAM J. MANN,
Special Examiner.

Ques. State whether said Manhattan Medicine Co. have acted and done business as a corporation since Oct. 12, 1874.

Ans. It has.

Ques. By the contract with the Bateman heirs the Manhattan Company has the option of purchasing the absolute title of said Bateman heirs and representatives to said recipe, name, trade-mark, &c. State whether the company has exercised that option by the purchase of such absolute title.

Ans. It has.

Cross-examination by Mr. CLIFFORD:

Ques. Do you know from whom Dorman or Noyes, Manning & Co., or Carter, derived their titles to this trade-mark?

Ans. No, except by the papers in and other papers of the company.

Ques. Will you name the other papers of the company besides those now put in, which give any account of the derivation of the titles of the parties named in the foregoing interrogatory?

Ans. Moses Atwood and Moses Carter, and Benjamin S. Dodd, and Carter, Dodge & Co.

43 Ques. Do you know the price per gross of the bitters before the Manhattan Medicine Company bought out the parties you have named?

Ans. No.

Ques. Do you know whether there was a uniform price or not?

Ans. No.

Ques. State how the article is called for in the trade by purchasers, how billed and described on trade-lists, and whether the bitters are not known in the trade as Carter's, Mystic, &c. State fully.

Ans. I cannot answer the question. I have nothing to do with the sales, but merely keep the books.

Ques. Do or not your books show the bitters named or described by the words Carter's, Mystic, &c.?

Ans. They do not.

Ques. How are the bitters entered on your books?

Ans. Simply as Atwood's Bitters.

Ques. Do you or not know that the trade-lists describe these bitters by the names above given? I mean trade-lists of the company, or of John F. Henry, Curran & Co.

Ans. The Manhattan Medicine Company does not so describe them; that is my recollection.

A. EMMONS.

This agreement, made and entered into this the first day of January, A. D. 1875, by and between L. H. Bateman, Sarah L. A. Bateman, Sarah L. Bateman, and Elizabeth M. Bateman, heirs of the late L. H. Bateman, of the town of Georgetown, county of Essex, and State of Massachusetts, of the first part, and John F. Henry, Curran & Co., of the city, county, and State of New York, of the second part, witnesseth:

That for and in consideration of the sum of one dollar, paid by the parties of the second part to the aforesaid joint heirs of L. H. Bateman, parties of the first part, the receipt whereof is hereby duly acknowledged, the parties of the first part hereby sell, convey, release, set over, and transfer unto the parties of the second part, and by these presents do sell, convey, release, set over, and transfer unto said parties of the second part, all and singular, the trade-mark known as "Atwood's Vegetable Physical Jaundice Bitters," and recipe of the trade-mark inherited by them from the late L. H. Bateman, and held in fee-simple, with unincumbered right of conveyance, together with all the plates, types, moulds, advertising, and printed matter, and all implements and utensils used and in manufacturing the said Atwood's Vegetable Physical Jaundice Bitters. Granting unto the said John F. Henry, Curran & Co., their heirs and assigns, the full, free, and unrestricted right to make and merchandise the same, and to use the names Atwood, Moses Atwood, Bateman, and L. H. Bateman, the fac-simile signature or signatures of the same, as now used in or upon the said advertisements, labels, and wrappers of the said medicine, subject to the conditions hereinafter named.

44

And the said parties of the first part severally and jointly agree not to manufacture or sell, directly or indirectly, any medicine of similar character, name, or appearance, or use as the "Atwood Vegetable Physical Jaundice Bitters," or to use the name of L. H. Bateman, or Atwood or Moses Atwood in or upon any label, wrapper, advertisement, or bottle-mold in connection with any medicine or remedy whatever that may be used for the same purpose as the Atwood Vegetable Physical Jaundice Bitters, or that may in any way conflict with the sale of the same, or bear any resemblance thereto, in any respect whatever, but will jointly and severally protect and defend the parties of the second part in the peaceful possession of the said trade-mark and recipe, together with all the interests and profits accruing therefrom henceforth and forever, except as hereinafter stated.

45

And the parties of the second part hereby severally and jointly agree to keep a true and accurate account in their books of the number of gross of the said Atwood's Vegetable Physical Jaundice Bitters that they shall manufacture and sell, and to exhibit to the parties of the first part, or their lawful attorney, said account for their inspec-

tion twice each year, January and July, and on all proper occasions, and to pay to the parties of the first part a royalty of one dollar per gross on and for each and every gross of said bitters they shall manufacture and sell from the date of this agreement, payable at the end of each six months, namely, July 1st and January 1st of each year. And it is further agreed that if the parties of the second part fail to pay said royalty to the parties of the first part when due, and shall fail to pay for twelve months thereafter, then the parties of the first part shall have the power to declare this agreement void, provided the party of the first part serve a written notice on the parties of the secodd part in the city of New York at least ninety days before said time expires; or should said party of the second part neglect to keep a true account of the number of gross manufactured, or to exhibit the books at their office as before mentioned, then this agreement may be terminated the same as in case of failure to pay (this provision shall not prevent the parties of the first part from collecting said royalty of one dollar per gross when due), and the trade-mark and recipe of the trade-mark known as Atwood's Vegetable Physical Jaundice Bitters, together with the types, moulds, implements, and utensils used in the manufacture, and the use of the name Atwood, Moses Atwood and Bateman, L. H. Bateman, and the right to manufacture and sell such bitters and all else hereinbefore conveyed, shall revert to and become the property and rights of the parties of the first part as fully
46 as though the parties of the second part had never had any rights or interest in them.

It is further agreed that in lieu of said royalty (one dollar per gross) the said parties of the second part shall have the right and privilege at the end of the first year, or January 1, 1876, to purchase the said trade-mark and recipe and business of said bitters in fee simple upon the payment of the sum of three thousand dollars cash, and interest from the date of this agreement, and thereupon become sole owners of said trade-mark and recipe without the payment of any royalty; but in case they do not pay said sum of three thousand dollars and interest at the time aforesaid then they shall render an accurate account of the number of gross of said bitters manufactured and pay a royalty of one dollar per gross, as before mentioned, and said royalty shall be perpetual.

And the parties of the second part hereby jointly and severally agree (unless they shall purchase as before stated in lieu of paying royalty) not to communicate to any other party or parties, directly or indirectly, the recipe or method of compounding said bitters, and not to manufacture, directly or indirectly, or to be interested in, the manufacture of any other similar bitters or medicine to take the place, or designed to take the place, of said bitters in any manner; and the said parties of the second part (unless they purchase as aforesaid) jointly and severally agree not to use, authorize any other party or parties to use, the name of Moses Atwood or L. H. Bateman upon any similar medicine, or any medicine designed to take the place of or interfere with the sale of said bitters.

It is hereby mutually agreed by and between the parties hereto that the said parties of the second part shall permit the parties of the first part to put up what bitters they may have on hand in bulk, not
47 to exceed thirty gross; but that hereafter the said parties of the first part are to make no more at any time except in case of revert as aforesaid.

All settlements to be made at the office of the parties of the second part, and payment to be made in lawful money.

This contract and agreement is binding on all parties thereto, their heirs, administrators, executors, and assigns forever.

Witness our hands and seals.

L. H. BATEMAN.	[L. S.]
SARAH L. H. BATEMAN.	[L. S.]
SARAH L. BATEMAN.	[L. S.]
ELIZABETH M. BATEMAN.	[L. S.]

Witness to signature of Lewis H. Bateman, Sarah L. H. Bateman, Sarah L. Bateman, and Elizabeth M. Bateman—

RICHARD TENNY,
Justice of the Peace in and for the county of Essex, and State of Massachusetts.

JOHN F. H. CURRAN & CO.	[L. S.]
JOHN F. HENRY.	[L. S.]
THEO. CURRAN.	[L. S.]
HENRY E. BOWEN.	[L. S.]

Witness to signature of John F. Henry, Theo. Curran, and Henry E. Bowen, firm of John F. Henry, Curran & Co.—

{ B. S. BARRETT, NOTARY PUBLIC, SEAL. NEW YORK. }

B. S. BARRETT,
Notary Public,
City and County of N. Y.

A true copy of original.

NEW YORK, *March* 18, 1875.

In consideration of one dollar to us in hand paid by the Manhattan Medicine Co., and other valuable considerations, we hereby sell to said Co. the foregoing contract.

JOHN F. HENRY, CURRAN & CO.

48 APRIL 1, 1875.

This agreement made and entered into by and between Henry B. Noyes and Francis M. Manning, both of the firm of H. B. Noyes & Co., doing drug business at Mystic Bridge, county of New London, and State of Connecticut, of the first part, and the Manhattan Medicine Company, a corporation duly organized under the laws of the State of New York, present office at 9 College Place, city, county, and State of New York, of the second part, witnesseth:

That for and in consideration of one dollar paid by the party of the second part to the party of the first part, and in further consideration that the party of the second part pay the party of the first part cash at date one thousand dollars, and one promissory note of one thousand dollars payable in one year from date, with interest, and one promissory note of one thousand dollars payable in two years from date, with interest, and thirty shares of Manhattan Medicine Company's stock, the receipt whereof is hereby duly acknowledged, the party of the first part hereby sell, convey, release, set over, and transfer unto the party of the second part, and by these presents do so sell, convey, release, set over, and transfer unto the said party of the second part, all their right, title, and interest in and to the trade-mark and recipe of the well-known medicine, Atwood's Vegetable Physical Jaundice Bitters, meaning to convey all and every right and interest in and to the same

proprietorship, good-will, and benefits, being the same as deeded by Benj. S. Dodge to the party of the first part, granting unto the said Manhattan Medicine Company the full, free, and unrestricted right to make and merchandise the same, and to use the name of Atwood's Vegetable Physical Jaundice Bitters, and the name Moses Atwood, Georgetown, Mass., and the fac-simile signature or signatures as now used in and upon the said advertisements, labels and wrappers
49 of said medicine; also the bottle-mould with the name blown in the glass, "Atwood's Jaundice Bitters, Moses Atwood, Georgetown, Mass.," to have and to hold forever.

And said party of the first part severally and jointly agree not to manufacture, directly or indirectly, any medicine of similar character, name, or appearance or use as the Atwood's Physical Jaundice Bitters, or to use the name Atwood or Moses Atwood on label, advertisement, or bottle-mould in any connection with any medicine or remedy whatever, that may be used for the same purposes as the Atwood's Bitters, or that may conflict with the sale of the same or bear any resemblance thereto in any respect whatever. And they, the party of the first part, further agree never to divulge the secret or recipe to any person or persons whatever, but in good faith give peaceful possession of the said trade-mark, recipe, and good will, together with all the rights, interests, and profits accruing therefrom, henceforth, and forever. The above conveyance meaning all of "Atwood's medicines," the same as conveyed by Benj. S. Dodge, of Georgetown, Mass., and all acquired rights, if any, gained by peaceful possession.

That party of the first part have never sold any right, but that, until the sealing of these presents, they are the lawful owners of said "Atwood's medicines" and have full right to convey the same. This contract is binding on the parties hereto, their heirs, administrators, executors, and assigns.

Witness our hand and seal, date as before written, April 1st, A. D. 1875, and signed this 21st day of April, A. D. 1875.

HENRY B. NOYES, *by Att'y.* [L. S.]
FRANCIS M. MANNING. [L. S.]
MANHATTAN MED. CO. [L. S.]
B. S. BARRETT, *President.*

Witness: E. B. JOHNSON.

A true copy of original.

WILLIAM J. MANN,
Special Examiner.

50 Know all men by these presents that I, Henry B. Noyes, of the town of Stonington, in the county of New London, State of Connecticut, do hereby make, constitute, and appoint Francis M. Manning, of the same town of, in the county and State aforesaid, my true, sufficent, and lawful attorney, for me, in my name, sell, assign, transfer, and convey to the Manhattan Medicine Company, of the city of New York, all my right, title, and interest, as one of the firm of H. B. Noyes & Co., in the medicine called "Atwood's Physical Jaundice Bitters," and to sign for me, and in my name, any papers that may be necessary to convey all my right, title, and interest in said medicine, and to do and perform all necessary acts in the execution and prosecution of the aforesaid business, in as full and ample a manner as I might do if I were personally present also to.

In witness whereof I have hereunto set my hand and seal, this nineteenth day of April, A. D. 1875.

HENRY B. NOYES. [L. S.]

In the presence of—
J. O. FISH.

STATE OF CONNECTICUT,
County of New London, ss:

On this nineteenth day of April, 1875, personally appeared the aforesaid Henry B. Noyes, signer and sealer of the aforegoing instrument, and acknowledged the same to be his free act and deed, before me.

NOTARIAL SEAL. J. O. FISH, NOTARY PUBLIC. J. O. FISH,
Notary Public.

A true copy of original annexed to foregoing bill of sale.

WILLIAM J. MANN,
Special Examiner.

51 *Bill of sale of personal property.*

Know all men by these presents that I, Benjamin S. Dodge, of Rawley, in the county of Essex, and State of Massachusetts, for and in consideration of the sum of one dollar to me in hand well and truly paid at or before signing, sealing, and delivering of these presents, by Manhattan Medicine Company, located in the city of New York, county, and State of New York, the receipt whereof I, the said Benjamin S. Dodge, do hereby acknowledge, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said Manhattan Medicine Company, all my right, title, and interest in the manufacture and sale, or to manufacture and sell Atwood's Jaundice Bitters, so called, and other of Atwood's medicines, said bitters and medicines having formerly been manufactured and sold by Moses Atwood, formerly of said town of Georgetown.

To have and to hold the said granted and bargained right and title unto the said Manhattan Medicine Co., their successors, administrators, and assigns, to their only proper use, benefit, and behoof forever; and I, the said Benjamin S. Dodge, do vouch myself to be the true and lawful owner of the said right and title, and have in me full power, good right, and lawful authority to dispose of the said right, title, and interest in manner aforesaid, and I do for myself, heirs, executors, and administrators, hereby covenant and agree to warrant and defend the said right, title, and interest against the lawful claims of persons by, through or under me, unto the said Manhattan Medicine Company, their successors, administrators, and assigns, against the lawful claims and demands of all persons by or under me as aforesaid.

In witness whereof I, the said Benjamin S. Dodge, have here-
52 unto set my hand and seal, this thirtieth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

BENJAMIN S. DODGE. [L. S.]

Executed and delivered in presence of—
O. B. TENNEY.

A true copy of original.
Attest:

WILLIAM J. MANN,
Special Examiner.

Bill of sale of personal property.

Know all men by these presents that I, Benjamin S. Dodge, of Rawley, in the county of Essex, and Commonwealth of Massachusetts, for and in consideration of the sum of fifty dollars to me in hand well and truly paid at or before signing, sealing, and delivery of these presents by William B. Dorman, of Georgetown, in said county, the receipt whereof I, the said Benjamin S. Dodge, do hereby acknowledge, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said William B. Dorman all my right and title to manufacture and sell Atwood's medicines, said medicines having formerly been manufactured and sold by Moses Atwood, formerly of said Georgetown.

To have and to hold the said granted and bargained right unto the said William B. Dorman, his heirs, executors, administrators, and assigns, to his and their only proper use, benefit, and behoof forever; and I, the said Benjamin S. Dodge, do vouch myself to be the true and lawful owner of the said right, and have in me full power, good right, and lawful authority to dispose of the said right in manner as aforesaid, and I do for myself, for my heirs, executors, and administrators,
53 hereby covenant and agree to warrant and defend the said right unto the said William B. Dorman, his heirs, executors, and administrators, and assigns, against the lawful claims and demands of all persons whomsoever.

In witness whereof I, the said Benjamin S. Dodge, have hereunto set my hand and seal this seventeenth day of April, in the year of our Lord one thousand eight hundred seventy-three.

BENJAMIN S. DODGE. [L. S.]

Executed and delivered in presence of—
C. O. MORSE.

WILLIAM J. MANN,
Special Examiner.

Know all men by these presents that I, the within named William B. Dorman, do hereby assign to the Manhattan Medicine Company, of the city, county, and State of New York, for the consideration of five hundred dollars to me heretofore paid by the said Manhattan Medicine Co., all my right, title, and interest under and by virtue of the within conveyance, and also all my right to manufacture and sell Atwood's Jaundice Bitters, or other of Atwood's medicines formerly manufactured and sold by Moses Atwood, of Georgetown, county of Essex and State of Massachusetts, hereby binding myself, my heirs, executors, and administrators and assigns firmly by these presents.

In witness whereof I, the said William B. Dorman, have hereunto set my hand and seal this thirtieth day of March, in the year eighteen hundred and seventy-five.

WILL. B. DORMAN. [L. S.]

Executed in presence of—
O. B. TENNY.

54 Know all men by these presents that I, M. Frank Carter, of Bridgeport, in the county of Fairfield and State of Connecticut, in consideration of one dollar, and other good and valuable consideration to me in hand well and truly paid at or before the delivery hereof, by Luther F. Carter, of Georgetown, in the county of Essex and State

of Massachusetts, do hereby remise, release, sell, convey, and forever quit-claim unto the said Luther F. Carter, all my right, title, claim, and interest under and by virtue of the will of my father, the late Moses Carter, of said town of Georgetown, in and to the manufacture and sale of certain well known medicines known as "Carter's Atwood's Vegetable Physical Jaundice Bitters," and "Moses Atwood's Vegetable Physical Jaundice Bitters," also all trade-marks, recipes, good-will or proprietorship in or used in the manufacture of the same, also the right to use the name "M. Carter and Son, Georgetown, Mass.," in the manufacture and sale thereof, or any labels, advertisements, or circulars, as the same has been heretofore used; also the bottle-mould with the name blown in the glass, "Atwood's Jaundice Bitters, M. Carter and Son, Georgetown, Mass.," together with all and singular the rights and interests to me devised under the will aforesaid, as purchased by my said father of Moses Atwood, formerly of said Georgetown, and conveyed by said Atwood to Carter and Dodge and Carter, Dodge and Co.

To have and to hold the herein conveyed rights and interests to the said Luther F. Carter, his heirs, executors, administrators, and assigns, to his and their only proper use, benefit, and behoof forever.

And I, the said M. Frank Carter, for myself, my heirs, and executors, and administrators, do covenant with the said Luther F. Carter, his heirs and assigns, that the rights and interests herein conveyed are free from incumbrances made or suffered by me, and that I will,
55 and my heirs, executors, and administrators shall warrant and defend the same to the said Luther F. Carter, his heirs and assigns forever, against the lawful claims and demands of all persons claiming by, through, or under me, but against none other.

In witness whereof I, the said M. Frank Carter, have hereunto set my hand and seal this first day of March, A. D. eighteen hundred and seventy-five.

M. FRANK CARTER. [L. S.]

Executed in presence of—
CHAS. E. AXTELLE.

Know all men by these presents that I, the within named Luther P. Carter, for value received, do hereby assign, transfer, and set over to the Manhattan Medicine Company, a corporation duly established under the laws of the State of New York, and their present place of business being at No. 9 College Place, in the city, county, and State of New York, to their successors and assigns, all my right, interest, and equity in and by virtue of the within instrument, to have and to hold the same to the said company, their successors, and assigns forever.

In witness whereof, I bind myself, my heirs, executors, administrators, and assigns forever.

Witness my hand and seal, at Georgetown, in the county of Essex and State of Massachusetts, this nineteenth day of April, A. D. eighteen hundred and seventy-five.

LUTHER F. CARTER. [L. S.]

Executed in presence of—
O. B. TENNY.

Know all men by these presents that we, Charles L. Carter, of Andover, in the county of Essex, Mary A. Titcomb, of Newburyport, in said county, and Sarah P. Osgood of Georgetown, in said county,
56 and all of the Commonwealth of Massachusetts, in consideration

of one dollar to us paid by the Manhattan Medicine Company, a corporation duly organized under the laws of the State of New York, and now located at No. 9 College Place, city, county, and State of New York, the receipt whereof is hereby acknowledged, do hereby remise, release, and forever quit-claim unto the said Manhattan Medicine Company, all our right, title, claim, and interest in and to the trade-marks, recipes, good will, and proprietorship in and to the well known medicine "Carter's Atwood's Vegetable Physical Jaundice Bitters," and "Moses Atwood's Vegetable Physical Jaundice Bitters," and all other Atwood's medicines, so called, as labelled, put up, and advertised by M. Carter & Son, and also all right in the twelve-square bottle now used for said bitters, and also the style and form of labels used thereon, together with the bottle-mould, with the name blown in the glass, "Atwood's Jaundice Bitters, M. Carter & Son, Georgetown, Mass." And we, the said grantors, for ourselves and our heirs, executors, administrators, do covenant with the said Manhattan Medicine Company, that the rights, titles, claims, and interests herein conveyed are free from all incumbrances, made or suffered by us, and that we will, and our heirs, executors, and administrators shall warrant and defend the same to the said Manhattan Medicine Company, their successors or assigns forever, against the lawful claims and demands of all persons claiming by, through, or under us, but against none other.

In witness whereof we have hereunto set our hands and seals, this twelfth day of April, A. D. eighteen hundred and seventy-five.

CHAS. L. CARTER. [L. S.]
MARY A. TITCOMB. [L. S.]
SARAH P. OSGOOD. [L. S.]

Executed in the presence of—
LUTHER F. CARTER.

57 *Articles of association of the Manhattan Medicine Company.*

We, the undersigned, Asa Emmons, Byron S. Barrett, and Joseph A. Vose, whose names are herewith subscribed, do by these presents certify:

First. That we desire to form a company, for the purpose hereinafter set forth, under and pursuant to the provisions of an act of the people of the State of New York represented in senate and assembly, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed by the legislature of the State of New York on the 17th day of February, 1848, and the several acts in addition thereto and amendatory thereof.

Second. And we do further certify that the corporate name of said company shall be "The Manhattan Medicine Company."

Third. The objects for which said company is formed are the manufacture and sale of proprietary medicines, perfumery, and other articles, consisting of Spalding's Cephalic Pills, Spaulding's Throat Confections, Gregory's Aperient, Gregory's Extract of Opium, Tom's Condition Powders, Tom's Russian Liniment and Arab Perfumes, &c., &c.

Fourth. The amount of the capital stock of the said company shall be two hundred thousand dollars.

Fifth. The number of shares of which the capital stock of the said company shall consist shall be two thousand, of one hundred dollars each.

Sixth. The term of the existence of said company shall be fifty years.

Seventh. The number of trustees who shall manage the concerns of

said company for the first year shall be three, and their names shall be as follows: that is to say, Asa Emmons, Byron S. Barrett, and
58 Joseph A. Vose, severally citizens of the United States, a majority of whom are residents of the State of New York.

Eighth. The principal part of the business of said company is to be transacted in the city and county of New York, and the office of said company shall for the present be at No. 9 College Place, New York.

In witness whereof we have made and signed this certificate and duplicate, at the city and within the county of New York, this twenty-first day of September, A. D. 1874.

J. A. VOSE. [SEAL.]
B. S. BARRETT. [SEAL.]
A. EMMONS. [SEAL.]

STATE OF NEW YORK,
City and County of New York, ss:

On the twenty-first day of September, A. D. one thousand eight hundred and seventy-four, before me came personally Asa Emmons, Byron S. Barrett, and Joseph A. Vose, to me personally known to be the persons described in and who executed the above instrument of writing, and severally acknowledged that they executed the same.

[SEAL.] W. C. KING,
Notary Public, City and County of New York.

(Endorsed:) Filed 22d of September, 1874.

STATE OF NEW YORK,
City and County of New York, ss:

I, William Walsh, clerk of the said city and county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original articles of association on file in my office, and that the same is a correct transcript therefrom and of the whole of such original.

59 In witness whereof I have hereunto subscribed my name and affixed my official seal this 22d day of September, 1874.

[L. S.] WM. WALSH, *Clerk.*

STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceding with the duplicate original certificate of incorporation of the "Manhattan Medicine Company," with the acknowledgment thereto annexed, filed in this office on the 23d day of September, 1874, and hereby certify the same to be a correct transcript therefrom and of the whole of said duplicate original.

Witness my hand and seal of office of the secretary of state, at the city of Albany, this 23d day of September, one thousand eight hundred and seventy-four.

[SEAL.] DIEDRICH WILLERS, JR.,
Secretary of State.

NEW YORK, *October* 12, 1874.

A meeting of the stockholders of the Manhattan Medicine Company was held this day at No. 9 College Place, Mr. Asa Emmons presiding.

On motion the by-laws were adopted, and the meeting then confirmed the board of trustees named in the articles of association, after which they adjourned.

A meeting of the trustees was then held at the same time and place, and the following officers were elected: B. S. Barrett, president; Joseph A. Vose, secretary; Asa Emmons, treasurer.

60 The whole amount of the capital stock was then made over to the president, B. S. Barrett, as the same has been paid for in full, and the entire stock of the association is therefore paid up.

The meeting then adjourned subject to the call of the trustees.

B. S. BARRETT,
Secretary pro tem.

Deposition of John F. Henry.

JOHN F. HENRY, being duly sworn, testifies as follows:

By complainant's solicitors:

Ques. Where do you reside?

Ans. Brooklyn, New York.

Ques. What is your occupation?

Ans. Wholesale druggist.

Ques. Are you a member of a firm; and, if so, what is the name of the firm, and where is the place of business of the firm?

Ans. I am a member of the firm of John F. Henry, Curran & Co.; place of business, 8 and 9 College place, New York City.

Ques. Is your firm a dealer in proprietary medicines?

Ans. It is.

Ques. How long have you individually and as a member of firms been engaged in the drug and proprietary medicine business, and in what places?

Ans. More than twenty years; in Waterbury, Vt.; Montreal, Canada, and New York City.

Ques. Are you acquainted with the article of medicine in question in this suit, called Atwood's Vegetable Physical Jaundice Bitters; and, if yea, how long have you been acquainted with it, and to what extent, and in what way?

61 Ans. I am acquainted with the article, and have been acquainted with it more than twenty years, having bought and sold it largely during that time, wholesale and retail.

Ques. State whether during all this time you have been familiar with the form of the bottle in which the bitters have been put up, and the labels used on the bottles and packages.

Ans. I have.

Ques. Describe the bottles and labels in which the article has been put up and sold during such time.

Ans. It is a twelve-sided bottle, with the letters blown in the glass—Atwood's Jaundice Bitters, Moses Atwood, Georgetown, Mass. The label has always been like Exhibit A, February 14, 1876; the bottle the same as that bearing the label marked Exhibit A, February 14, 1876. The bottles have always been the same, with the exception that the flange on the top of the neck of the bottle was at one time not quite so thick as it is now.

Ques. State whether or not said bitters, put up in the manner and form you have described, have for many years been a well-known, popular, and well-established article of trade in the proprietary medicine business.

Ans. They have.

Ques. State by what name said bitters are known and called by persons dealing in and using the same.

Ans. Atwood's Bitters.

Ques. State whether, when the term Atwood's Bitters has been used, the article in question has been always understood and meant.

(Objected to as hearsay.)

Ans. Yes.

Ques. State whether, if at any time during the twenty years you have dealt in this article, you heard Atwood's Bitters called for or mentioned; to what thing did you understand as referred to.

62 Ans. That it referred to Atwood's Vegetable Physical Jaundice Bitters, and the article in the form of Exhibit A, February 14, 1876.

(Leading.)

Ques. State whether or not said article, put up in the manner and form of Exhibit A, has been a standard article of trade in the proprietary medicine business.

(Objected to as calling for reasoning from the witness.)

Ans. Yes.

Ques. From whom during these twenty years have you purchased Atwood's Bitters?

Ans. Carter, Dodge & Co. and their successors.

Ques. Were Carter, Dodge & Co. the manufacturers of the bitters?

Ans. Yes.

Ques. Where did they and their successors manufacture said Atwood's Bitters?

Ans. Georgetown, Massachusetts; Noyes & Co., one of their successors, made it at Mystic Bridge, Connecticut.

Ques. Did you ever know of said Atwood's Bitters being made at any other places besides Georgetown and Mystic Bridge?

Ans. No; except the Manhattan Co., who have made them at New York.

Ques. Do you know from whom dealers in proprietary medicines have purchased said Atwood's Bitters during the twenty years?

A. Carter. Dodge & Co. and their successors.

Ques. State who were the successors of Carter, Dodge & Co. in the business of making and selling said Atwood's Bitters?

(Objected to, as there is better evidence.)

Ans. Carter & Sons, Noyes & Co., and Manhattan Medicine Co. Bateman, of Georgetown, Mass., claimed the title from Moses Atwood.

63 Ques. Did Bateman make and sell said Atwood's Bitters?

Ans. Yes.

Ques. Under what title did said Bateman claim the right to put up and sell said Atwood's Bitters?

Ans. He claimed that he was a partner of Moses Atwood, at one time, in the manufacture of the bitters.

Ques. Whom do you mean by Moses Atwood?

Ans. The original inventor and manufacturer and vender of said bitters.

Ques. State whether or not during the twenty years you have dealt in this article any exclusive title to the trade-marks, label, &c., of Atwood's Bitters has been recognized and regarded by the drug and proprietary trade.

(Objected to as to form, hearsay, witness not qualified. Question waived for the present.)

Ques. State whether you have a general acquaintance with the drug and proprietary trade of the United States.

Ans. Yes.

Ques. How long have you had a general knowledge of the drug and proprietary medicine business?

Ans. I had a pretty general knowledge for fifteen years before I came to New York, and have had a very general knowledge for the last ten years.

Ques. How does the house of John F. Henry, Curran & Co. compare, in respect to the extent of its operations, with other concerns in the same business?

Ans. We buy and sell more proprietary medicines than any other house in the United States.

Ques. During the time you have been acquainted with Atwood's Bitters state whether, to your knowledge, the drug and proprietary medicine trade have recognized and treated any particular person and persons, as having the exclusive right to make and sell said Atwood's Bitters under such form and trade-marks; and if yea, who were such person and persons?

64 (Objected to as immaterial.)

Ans. Yes; Carter, Dodge & Co. and their successors, and sometimes Bateman.

Ques. State from whom said Carter, Dodge & Co. were considered by the trade to have derived their title to use exclusively said trade-marks, &c.

(Objected to as hearsay and immaterial.)

Ans. Moses Atwood.

Ques. State whether during all your twenty years' experience in dealing in this article of Atwood's Bitters you ever knew or heard of the exclusive title of Carter, Dodge & Co. and their successors as derived from Moses Atwood, being disputed or called in question until about the time this suit was commenced for infringement.

(Same objection as above.)

Ans. No, I did not; except Bateman.

Ques. State whether said Atwood's Bitters, put up in the manner and form described, have been extensively sold.

Ans. Yes.

Ques. State whether or not the trade-mark rights to put up and sell Atwood's Bitters, in the manner and form described, has been very valuable for many years.

Ans. Yes, sir.

Ques. What has made said Atwood's Bitters so valuable and popular?

Ans. We have always considered it a good article; it has been made a good many years, and people have told each other about them; and they have been advertised more or less.

Ques. State how a trade-mark in the proprietary medicine business acquires value.

(Objected to as improper, immaterial.)

65 Ans. In the first place by having a good article; by people's having confidence in the manufacturers, and keeping it in the market many years, and by advertising.

(Answer objected to.)

FEBRUARY 17TH.

Adjourned on account of the illness of Mr. Clifford, until February 18th, at 10.30 a. m.

FEBRUARY 18TH.

Adjourned on account of the illness of Mr. Clifford, until February 19th, at 10 o'clock.

FEBRUARY 19TH.

Parties present by their respective counsel.

Examination of Mr. Henry continued, by Mr. CHASE:

Ques. Were Atwood's Bitters advertised by Carter, Dodge & Co., and their successors, before the Manhattan Medicine Company?

Ans. Yes.

Ques. How extensively?

Ans. Liberally by circulars, and more or less in the newspapers.

Ques. State whether said bitters have been so advertised ever since your acquaintance with them.

Ans. They have.

Ques. Has the Manhattan Medicine Company, since it became the proprietor of said Atwood's Bitters, advertised them; and in what way?

Ans. Yes; they have advertised them in the usual ways of advertising proprietary medicines; in books, such as are known having calendars, and by circulars, and in newspapers, and by show-cards.

66 Ques. State whether or not said Atwood's Bitters have been advertised by the Manhattan Medicine Co., and by its predecessors, under the name and trade-marks as indicated by Exhibit A, February 14, 1876.

Ans. They have been so advertised.

Ques. State how the successors of Carter, Dodge & Co., and predecessors of the Manhattan Medicine Co. distinguish the article as put up and sold by them.

Ans. The successors of Carter, Dodge & Co., claimed the exclusive right to make and sell Atwood's Bitters, under said name and trade-marks; but L. H. Bateman also claimed a right from Moses Atwood, and to distinguish them Carter & Sons put their names upon the label of the bitters made by them, and Bateman also put his name across the label that was made by him. I do not think that Noyes & Manning, the Mystic parties, used anything but the old label without any distinguishing mark. I mean label like Exhibit A, Feb. 14, 1876. I never saw any of Dorman's.

Ques. Are John F. Henry, Curran & Co., the only wholesale agents in New York, of the Manhattan Medicine Co.?

Ans. They are.

Ques. About how extensive have been the sales of said Atwood's Bitters since the Manhattan Medicine Co. became the owners of it?

Ans. I should think about a thousand gross a year.

Ques. To what parts is the article sold?

Ans. More largely in New England and New York, and also largely in the Western States.

Ques. State whether the Manhattan Medicine Association has become the owner of all the trade-mark rights of said Atwood's Bitters?

Ans. Yes.

Ques. From whom did they become the owners?

67 Ans. The successors of Carter, Dodge & Co., and from the estate of L. H. Bateman.

Ques. State whether the manufacture and sale of said Atwood's Bitters is a profitable one.

Ans. Yes.

Ques. What net profit is made on said article?

Ans. Fifteen dollars a gross.

Ques. State whether the business of making and selling a genuine proprietary medicine is greatly injured by the sale of an imitation of the same article.

Ans. Yes.

Ques. In what way?

Ans. First, because they take a portion of the business, and second, because there being a question about the genuineness of the article, people are afraid to purchase and use it.

Ques. State, as nearly as you can, the actual loss to the Manhattan Medicine Co. by the sale of their imitation article of Atwood's Bitters.

Ans. I should say ten thousand dollars a year while they are selling.

Ques. What do you think the loss would be per gross of imitation article sold?

Ans. At least fifteen dollars per gross.

Ques. And what would be the damage, in your opinion, in respect to the loss of confidence in the genuine article, caused by the sale of the imitation?

Ans. I believe that the sale of Atwood's Bitters would be at least twice what it now is, were it not for the imitation article. A loss of fifteen dollars a gross more is caused by the loss of confidence.

Ques. Do you mean that for every gross of the imitation article sold, the Manhattan Medicine Company suffers a loss of at least thirty dollars?

68 Ans. Yes, and a good deal more; because the loss of confidence, &c., may prevent two or three gross of the genuine being sold.

Cross-examination by Mr. CLIFFORD:

Ques. What are the ingredients of Atwood's Bitters?

(Objected to on the ground that it calls for a secret formula, and as irrelevant and immaterial.)

Ans. I don't know. The secret is only known to the chemist of the Manhattan Medicine Co.

Ques. When you speak of genuine and imitation, do you refer to anything else than the bottle, the label, the words on the label, and the words blown in the bottle?

Ans. Yes, I refer to that, together with the rightful owner of the trade-mark.

Ques. Will you explain how you can testify about bitters being genuine or imitation when you do not know the Manhattan Co.'s receipt, as you have testified?

Ans. I know by the parties owning the trade-mark, by the genuine appearance of the bottle, stamp, and label.

Ques. Is that all from which you judge?

Ans. Wholesale druggists know little of the recipes of the proprietary medicines that they sell.

Ques. Then you judge wholly by the exterior of the bottle or package, the label, &c., do you not?

Ans. We always have to take into consideration the house from which we purchase, in determining the genuineness of the article; and I always try to buy from the lawful owners of the trade-marks and proprietors, and I like, as far as possible, to purchase from first hands or manufacturers, so as to be sure to get a genuine article.

Ques. Have you now given all the tests by which you determine upon the genuineness of these bitters?

Ans. Substantially.

Ques. Do you know how Dorman acquired a right to the use of this bottle and trade-mark; if yea, from whom?

69 Ans. I have a general impression that he was a partner of Carter, Dodge & Co., or of Mr. Dodge.

Ques. Do you know if he obtained any grant or assignment of a privilege to use this label and this bottle; and if yea, from whom?

Ans. From Carter, Dodge, & Co., or Mr. Dodge.

Ques. Do you know from whom Noyes, Manning & Co., or either of them, obtained any right to use the same?

Ans. They obtained their right from Carter, Dodge & Co. or Mr. Dodge. I think Mr. Dodge especially.

Ques. Do you know whether Bateman had any assignment or grant of any right; have you ever seen one to him from any one?

Ans. He had a presumptive right, having once been a partner in the manufacture of the genuine bitters with Moses Atwood.

Ques. Do you know how Dodge got his right, if he had any?

Ans. He was a partner of the house of Carter, Dodge & Co., and the house owned the right to manufacture and sell the genuine Atwood's Bitters.

Ques. How long did the different men or firms manufacture these bitters with the use of a bottle and label such as Exhibit A, before the Manhattan Co. bought them out?

Ans. The Carters have been engaged in it for twenty years or more; Bateman quite as long; do not know how long Dorman has, but Noyes, Manning & Co., I should think about six years.

Ques. These parties used the yellow labels with Atwood's Bitters printed thereon, and the other words and letters as shown in Exhibit A, did they not?

Ans. Yes.

Ques. Did not Bateman and Carter each claim, in opposition to each other, that theirs were the only genuine bitters?

70 Ans. Carter claimed that his was the only genuine bitter until Noyes came in; Bateman did not claim that his was the only genuine bitter, he admitted that Carter's was genuine, but he claimed that he had a right, having been a partner of Moses Atwood, to manufacture the bitters. Carter always denied Bateman's right.

Ques. Do you not know that Bateman issued circulars or advertisements, stating his manufacture to be the only genuine one, and giving a name or mark by which they could be distinguished and known?

Ans. I do not know that he claimed they were the only genuine.

Ques. Do you know the formula under which the defendant puts up his bitters?

Ans. No.

Ques. Where do the Manhattan Co. now manufacture?

Ans. 118 Warren st., New York.

Ques. Your house takes their whole product, do you not?

Ans. No.

Ques. Who takes any of the Atwood's Bitters besides you?

Ans. A firm in Burlington, Vt., and there may be others.

Ques. Do you state that the amount of damage that you have stated is occasioned by the sale of a bottle and label like Exhibit B?

Ans. My estimate of damages is made up by the consideration of imitations such as Exhibit B, and the general imitation of Atwood's Bitters, including the imitation of the bottle marked Exhibit A.

Ques. How much does a bottle such as Exhibit B, interfere with the

sales of the Manhattan Co., getting at your estimate by stating the extent to which it supplants what you call the genuine article?

71 Ans. I am unable to state definitely. My estimate was made up on a general imitation, not wholly that one; I am unable to distinguish between the two.

Ques. Do you know anything about the amount, if any, of the sales made by the defendant in the form of bottle other than the one like Exhibit B?

Ans. I don't know Mr. Wood's sales.

Direct resumed by Mr. CHASE:

Ques. The agreement between the heirs and representatives of L. H. Bateman, John F. Henry, Curran & Co., is signed, I notice, besides by the Batemans and John F. Henry, Curran & Co., by John F. Henry, Theodore Curran and Henry E. Bowen; state whether John F. Henry, Theodore Curran, and Henry E. Bowen are the individual members composing the firm of John F. Henry, Curran & Co.

Ans. Yes.

JOHN F. HENRY.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 19th day of February, before

WILLIAM J. MANN,
Special Examiner.

Deposition of Charles F. Sanborn.

CHARLES F. SANBORN being duly sworn, testified as follows:

By complainant's solicitors:

Ques. Where do you reside?

Ans. In Brooklyn, N. Y.

Ques. What is your occupation?

Ans. Druggist.

72 Ques. Where is your place of business?

Ans. 44 Cedar street, New York.

Ques. Are you in business alone, or connected with a firm? And if with a firm, the name of the firm?

Ans. Not alone; firm, Reed & Co.

Ques. Are you in the wholesale or retail business?

Ans. Wholesale.

Ques. Are your firm dealers in proprietary medicines, as well as drugs?

Ans. Formerly dealt in both; now exclusively in drugs.

Ques. Are you acquainted with an article of medicine called Atwood's Vegetable Physical Jaundice Bitters? And, if yea, how long have you been acquainted with it?

Ans. I am. Twenty years.

Ques. In what way have you been acquainted with it?

Ans. In both buying and selling.

Ques. Describe the manner in which it has been put up and sold, in respect to the bottle, name and label.

Ans. It has been put up in a long fluted bottle, like Exhibit A, with a yellow label; in old times there was no proprietary stamp on them. The name and bottle and label were the same as Exhibit A, February 14, 1876.

Ques. Have you ever known Atwood's Bitters to be sold in any other form, as to bottle, name, and label?

Ans. Not to my personal knowledge.

Ques. How long have you been in business in New York City?

Ans. Ten years.

Ques. Where did you do business before that?

Ans. Boston, Mass.

Ques. Were you a member of a firm in Boston; and if so, what firm?

Ans. I was not.

Ques. How long were you in Boston in business?

Ans. Ten years.

73 Ques. Did you deal in Atwood's Bitters during the ten years you were in Boston in business?

Ans. I did.

Ques. How long after you came to New York did you continue to deal in Atwood's Bitters?

Ans. Three years.

Ques. State whether Atwood's Bitters, put up in the manner and form you have described, have been a well-established article in the proprietary medicine trade.

Ans. They have been.

(Bottle marked Exhibit C, Feb'y 19, 1876, put in evidence and marked by complainant's solicitors.)

Ques. Compare Exhibit A, of Feb. 14, 1876, with Exhibit C, of Feb. 19, 1876, in respect to words blown in the glass—the name and label—and state how they compare in respect to likeness and similarity.

Ans. They seem to be alike in those respects.

Ques. Considering your experience in the proprietary medicine business state whether, in your opinion, Exhibit C is so like Exhibit A, in respect to name, label, &c., as to be calculated to decieve and mislead the public into purchasing Exhibit C. for Exhibit A.

(Objected to.)

Ans. My opinion is it would.

Ques. Do you mean to be understood by your previous answers that you have been familiar with proprietary medicine trade-marks for twenty years?

Ans. I do.

Ques. State whether, in your opinion, an article put up in a form of bottle different from Exhibit A and C, but called by the name, to wit, Atwood's Genuine Vegetable Physical Jaundice Bitters, would be likely to deceive and mislead the public into purchasing it for the article put up as Exhibit A.

(Objected to as immaterial and not sufficiently specific.)

74 Ans. It would.

Ques. Now compare Exhibit A with Exhibit B and state whether there is such a similarity between the two as to be likely to deceive and mislead the public into purchasing Exhibit B for Exhibit A.

Ans. There is.

Cross-examined by Mr. CLIFFORD:

Ques. Has not the preparation called Atwood's Bitters, the medicine which is supposed to be contained in Exhibit A, always been put up in a fluted and paneled bottle like the bottle marked Exhibit A?

Ans. So far as I know.

Ques. And in purchasing the medicine have you or not been accustomed to regard that form of bottle as one of the tests or indications of the genuineness of the article as you would the label?

Ans. I have.

Ques. Then how do you say, since this fluted shape of the bottle is one of the marks by which you get at the genuineness of the medicine, that you could be deceived by buying a bottle without those sides on it like Exhibit B?

Ans. I did not so state.

Ques. Will you now state whether, upon a comparison of the size and the shape of these two bottles, Exhibit A and B, in view of your knowledge of this article of medicine, you could be deceived into buying B while thinking it to be A?

Ans. Personally, with my knowledge of it, I should not.

Ques. While you were in business and were selling these bitters how was the article known to be a genuine one so far as the appearance of the outside of the bottle was concerned? State all of the signs by which it was thus known.

Ans. The long fluted vial; the old-fashioned lip; the yellow label, and the name Moses Atwood.

75 Ques. Were or not these bitters then put up at Georgetown, Mass.?

Ans. They were.

Ques. Elsewhere?

Ans. Not to my knowledge.

Ques. Then it was understood in the trade, was it not, that the words Georgetown, Mass., indicated the place where the bitters were put up?

Ans. It was.

Ques. Was it not a fact, in your experience, that the words Atwood's Bitters did not particularize this particular medicine without the other marks, &c., which you have enumerated?

(Objected to.)

Ans. I never knew any other Atwood's Bitters, and in my mind the name could apply to no other article.

Ques. Do you know that several parties were at one time putting up these bitters in Georgetown, using a bottle and label substantially like Exhibit A?

Ans. I do not, several.

Ques. Will you state the parties whom you do know were doing as inquired of in the foregoing question?

Ans. I don't know of parties.

Ques. Whom did you understand to be the manufacturers of this medicine when you used to deal in it?

Ans. I don't know the exact style of the firm; the name is Carter.

Ques. Were there any others? And, if so, give me their names, if you can.

Ans. I remember the name of Dodge. I think and should say that Carter & Dodge were the firm.

Ques. Do you remember the name of any other persons, whether belonging to this firm or not? If so, please give them.

Ans. I remember one; L. H. Bateman.

76 Ques. Have you ever sold any of his bitters?

Ans. I have.

Ques. By what title were they known and distinguished above other bitters?

Ans. They were known by the same title, being the same bitters.

Ques. Were they or not known as Bateman's or Atwood's Bitters, put up by Bateman, or something of that kind?

Ans. As Atwood's Bitters, put up by Bateman as successor.

Ques. Was Bateman's name on the label?

Ans. I don't remember that.

Ques. How were the Carter Bitters known in the trade?

Ans. As the Georgetown Bitters.

Ques. Were they not known as put up by Carter, Carter, Dodge & Co., Carter & Sons, or something of that kind, so that they could be distinguished from the Bateman Bitters?

Ans. I don't think so. The one preceded the other simply. Carter preceded Bateman.

Ques. Now, when Carter was putting up the bitters were they not known as bitters put up by the Carter firm, and then when Bateman was putting them up were they not known in the trade as bitters put up by him?

Ans. My recollection is that they were first put up by Carter, then by Bateman and his successors. I have no recollection of two preparations put up and sold at the same time. They were always known by the name of Atwood's Bitters.

Ques. Do you remember whether the Carter Bitters bore their name or names on the label?

Ans. I do not.

Ques. Have you ever dealt any in the Mystic, Connecticut, Bitters?

Ans. I have not.

77 Ques. Do you know how these articles are named in the trade at the present time?

Ans. I do not exactly understand the question.

Ques. Have you seen any trade lists or advertisements of this medicine since the Manhattan Company have manufactured it; and, if you have, will you state how they are named, whether simply Atwood's Bitters, or whether they have other names also, as Atwood's Bitters, L. H. Bateman & Sons, Mystic, &c.?

Ans. I have not.

Ques. Did you ever see any such lists, advertisements, &c., of the medicine before the Manhattan Company purchased; and, if you did, please answer the foregoing question, limited to such time?

Ans. I have not seen them so as to be able to give any testimony.

Ques. Do you remember whether the bottle, when you sold the bitters, had in the glass the words Atwood's Jaundice Bitters, Moses Atwood, Georgetown, Mass.?

Ans. I recollect something of the kind.

Ques. Was that on the bottles Carter used?

Ans. I have no recollection.

Ques. Was that on the bottles that Bateman used?

Ans. I could not swear to that?

Ques. Did you ever know, when you were dealing in the bitters, that they were put up in a flat bottle?

Ans. No.

Ques. Did you ever know them to have any other label, as to color, than as per Exhibit A?

Ans. As to color, no; the exact shade may have varied.

CHARLES F. SANBORN.

Examination taken, reduced to writing, and by the witness subscribed and sworn to this 19th day of February, before

WILLIAM J. MANN,
Special Examiner.

78 *Deposition of George Sole.*

GEORGE SOLE, being duly sworn, testified as follows:

Called by complainant's solicitors:

Ques. Where do you reside?
Ans. 23 Varrick st., New York.
Ques. What is your business.
Ans. Dealer and proprietor of proprietary medicines.
Ques. How long has that been your business?
Ans. Nearly forty years.
Ques. How long in the city of New York?
Ans. All the time here.
Ques. What is the name of your present firm?
Ans. F. C. Wells & Co.
Ques. How long have you been a member of this firm?
Ans. Ever since I commenced business?
Ques. Is your house the oldest in the proprietary medicine trade in New York City?
Ans. To the best of my knowledge it is.
Ques. Are you acquainted with the article of medicine called Atwood's Bitters; and, if so, how long have you been acquainted with the article?
Ans. I am acquainted, and have been so for many years; the exact period I cannot say.
Ques. Do you think you have been acquainted with the article as long as twenty or twenty-five years?
Ans. I think I have been, but I cannot say positively.
Ques. Have you dealt in the article ever since it came into vogue?
Ans. I have.
Ques. Describe the article as you have known it in respect to form of bottle and name and label.

79 Ans. I have always known it in shape of bottle like Exhibit A. To the best of my knowledge, I have always known it as Atwood's Bitters or Atwood's Jaundice Bitters, and to the best of my knowledge there has always been a yellow label like Exhibit A.

Ques. Have you ever known the genuine Atwood's Bitters to be in any other form in respect to bottle, name and label?
Ans. I have always known that what was generally understood by the trade, and would be sent if Atwood's Bitters, or Atwood's Jaundice Bitters was called for, was like the article marked Exhibit A.
Ques. You mean in respect to form of bottle, name, and label?
Ans. Yes.
Ques. Whenever Atwood's Bitters have been called for or mentioned, what article did you understand the term Atwood's Bitters to mean?
Ans. I mean the kind that was originally made by Moses Atwood, and had his name. Through the various changes, his name was on very bottle, and the name Carter Dodge, or Dodge, or something of that kind, on the box in which they were put up, either in grosses or half grosses.
Ques. State whether Atwood's Bitters, put up in the manner you have described, like Exhibit A, is an old, well-established article in the proprietary medicine trade.
Ans. It is, and has had a large sale.
Ques. Is it not one of the oldest articles in the trade?

Ans. It may be so considered. I cannot say exactly, but it is one of the oldest.

Ques. State whether an article put up in a different form of bottle, say like Exhibit B, now shown you and called Atwood's Genuine Vegetable Physical Jaundice Bitters, would be likely to deceive ordinary purchasers.

Ans. The names being so similar it would deceive any one not familiar with the medicine. People generally ask for Atwood's Jaun-
80 dice Bitters, and not one person in ten asks for Atwood's Vegetable Physical Jaundice Bitters. If any one did not know about the medicine it would be liable to deceive them, because it is called by that name—Atwood's Jaundice Bitters.

Ques. Suppose a person was recommended to use Atwood's Bitters, and was not very familiar with the form and bottle and style of label like Exhibit A, and should call for Atwood's Bitters, and the dealer should pass to him a bottle like Exhibit B, would he not be likely to be deceived into purchasing it, supposing that he had purchased the genuine article?

(Objected to.)

Ans. Certainly he would; having asked for Atwood's Bitters, and seeing these words on the bottle, he would naturally suppose he had purchased the genuine article.

Cross-examination by Mr. CLIFFORD:

Ques. Would dealers in the article Exhibit A, ever be likely to purchase this one, Exhibit B, and think it was Exhibit A?

Ans. I should say no; but dealers not familiar with the article might be deceived as well as other persons.

Ques. Would you be likely to be deceived yourself?

Ans. No, sir.

Ques. Do you think, for instance, that any of the well-known druggists in this city would be likely, from their general knowledge of medicine business, to be deceived into buying Exhibit B, and thinking it was Exhibit A, by reason of the resemblance of the bottles?

Ans. No experienced druggist would be deceived; but I have known cases where young and inexperienced druggists have been deceived, and have received Exhibit B, when they had sent for Exhibit A. Druggists generally would not be deceived.

81 Ques. Do you know what kind of boxes the Exhibit A are usually packed in, if there is any uniformity about it?

Ans. There is a uniformity; they have usually been sold with Atwood's Jaundice Bitters on one side of the box, and Carter & Dodge, or Carter & Co., Georgetown, Mass., or something of the sort, on the other side.

Ques. Will you look at Exhibit A, and point out the features or marks by which you have been accustomed in your business to recognize that article?

Ans. I only recognize it by the shape of the bottle and the label; at wholesale we do not pay any attention to the minute points.

Ques. Are you not accustomed to look for the words Georgetown, Mass., on the boxes as well as on the labels?

Ans. No; we order it from the parties, and do not pay any particular attention to what is on it.

Ques. Did you not know that till within a few years the medicine was put up at Georgetown, Mass.?

Ans. I do not recollect.

Ques. Have you not in your business become acquainted with another medicine than this, called also Atwood's Bitters?

Ans. I knew such was in existence, and has been for several years past.

Ques. What was the nature of that Atwood's Bitters; describe it in a general way what it claimed to be?

Ans. It did not claim to be Moses Atwood's, it was F. L. or L. F. Atwood. There was another kind, I forget exactly what it was, called Atwood's Bitters.

Ques. Do you remember of any other Atwood's Bitters, not referring to any of the exhibits before you?

Ans. I do.

Ques. How many in all do you think you have known during your experience in the business; how many Atwood's Bitters?

82 Ans. I cannot say. This article, Exhibit A, is known as the only genuine one in this market, and we have never dealt in any other as far as my personal knowledge is concerned.

Ques. During how many years, as near as you can estimate, have you known these various Atwood's Bitters in the market or heard of them?

Ans. Many years or several years; I cannot answer it more definitely.

Ques. Do you know anything about this article except in the New York market; Exhibit A, I mean?

Ans. I know that is sold all over the country, and is sent to every large city, and I have so sent it.

FEBRUARY 21ST.

Parties present by their respective solicitors.

Examination continued by Mr. CLIFFORD:

Ques. Do you know the constituents of the article which you say has been put up and sold in a bottle, and with a label such as Exhibit A?

(Objected to as irrelevant, immaterial.)

Ans. No, I do not know.

Ques. Same question as to Exhibit B.

Ans. No, I do not know.

Ques. Have you any doubt but what they are substantially the same?

(Objected to as irrelevant and immaterial.)

Ans. I presume the general character is the same. I suppose both to be an aloetic mixture; further than that I cannot say.

Ques. Are the constituents of the Atwood's Bitters like Exhibit A, known to the trade generally, or to the public?

(Objected to as irrelevant and immaterial, and on the further
83 ground that witness has stated he does not know what the constituents are.)

Ans. No, sir; it is a secret preparation.

Ques. Would any one who knew anything about or had become acquainted with Exhibt A, be likely to purchase B, and think it was the same thing so far as the shape of the bottle and the label are concerned?

(Objected to as answered before.)

Ans. The bottle is different, and the label is somewhat different, so that a person familiar with Exhibit A, might object to receiving Exhibit B.

Ques. Since you consider the contents of A to be substantially the

same as the contents of B, as to what do you mean to be understood a person unacquainted with the form of A, might be deceived in purchasing B? Do you mean simply as to form of bottle, label, &c.?

Ans. Both being called Atwood's Jaundice Bitters, if a person objected to Exhibit B, on account of the form of bottle, the label, &c., the druggist might tell him that both were the same article and only put up in a different way.

Direct resumed by Mr. CHASE:

Ques. In your experience in the drug and proprietary medicine business, is it or not the fact that there are more or less spurious and counterfeit imitations of every well known and established medicine?

(Objected to as immaterial.)

Ans. Yes, almost every well known and popular medicine has been more or less imitated.

Ques. Is it not also the fact that a genuine article is more imitated in proportion as it has become popular and valuable?

(Same objection.)

84 Ans. Yes, sir; the greater the sale the more the inducement to imitate.

Ques. State whether or not complainant's article, Exhibit A, is sold to a considerable extent, by retail grocers and variety storekeepers, and others not regularly engaged in the medicine business.

Ans. It has been so; chiefly in the New England States.

Ques. Would not such persons, inexperienced in the drug and medicine business, be likely to be deceived by the similarity of names of Exhibit A and Exhibit B.?

(Objected to as to form.)

Ans. They would, sir. They generally buy whichever is the cheapest, without reference to the quality.

Ques. Would not a man, inexperienced in the medicine business, when first starting in business, and knowing of Atwood's Bitters only by general reputation, be likely to deceived into purchasing defendants' article B, supposing he was purchasing the genuine complainants' article A.

(Objected to.)

Ans. He would be likely to be deceived, the name being the same, provided he had no personal acquaintance with the article.

Ques. State whether complainants' article A has been extensively advertised.

Ans. It has. It has been advertised extensively in times past, but not so much of late.

Ques. Why has it not been advertised so much of late as formerly?

Ans. I presume because it has a great sale without.

(Answer objected to.)

Ques. Do you mean to be understood that on account of the established reputation and character of the article, that there is now less need of so much advertising?

(Objected to as leading.)

85 Ans. An article having once been made known, it is presumed that its merits will keep it going.

Ques. And is this true of complainants' article A?

Ans. The sale has continued to be large and is now very large, and therefore the presumption is that it has merit.

Ques. State whether, according to your experience, the success of an article in the proprietary medicine trade, depends very much upon a

large amount of money being expended upon it by advertising it and thereby calling the attention of the public to it.

(Objected to.)

Ans. Of course it does.

Ques. Is it not much easier to sell a spurious and counterfeit imitation of an article which has been extensively advertised and acquired an established reputation?

(Objected to.)

Ans. Certainly it is.

Ques. And in such case, does not the imitation article sell on the strength of the reputation of the genuine article?

(Objected to as general.)

Ans. Entirely so.

Ques. Is, or not, the business of making and selling the genuine article greatly injured by the sale of an imitation article? And, if yea, in what ways?

(Objected to as general.)

Ans. Imitation articles are generally inferior; parties having no knowledge of the ingredients of the article, make something to resemble it which in nine times out of ten has no merit; and, consequently, parties buying it and thinking it to be the real article, lose faith in the medicine, and its sale is consequently injured.

(Answer objected to as not pertinent.)

86 Cross-examination resumed by Mr. CLIFFORD:

Ques. What do you mean by genuine when applied to Exhibit A?

Ans. It is the article that has always been considered to be genuine in this market.

Ques. What do you mean by article?

Ans. The style of the bottle and the label; as to the contents, I must plead ignorance.

Ques. Then how do you know that the style of Exhibit A covers or represents a genuine article?

Ans. Having bought it of the acknowledged proprietors, we of course assume that it is the correct article.

Ques. In former years, was it not understood that this article was put up at Georgetown, Mass., and did you not always look for and expect to find that name on the bottles and packages, as a guarantee of the genuineness of the medicine, and the sameness of it in different bottles and packages?

Ans. To the best of my knowledge, such words have always been on the wooden boxes; buying it of the proprietors, we pay no special regard to the outside of the box.

Ques. By whom was the medicine understood in the trade to have been put up, and where, up to two or three years ago?

Ans. Generally understood to have been first put up by Moses Atwood, then by Carter or Carter, Dodge & Co., and then by others who derived their right to them, at Georgetown, Mass.

Ques. Is this medicine (Exhibit A) what is called a quack medicine?

(Objected to.)

Ans. It is a proprietary medicine, and the term quack medicine is generally applied to articles where the formula is not published.

87 Ques. Is not the term quack medicine also applied to those that profess to cure a large number of ills and diseases, like the list you see on the label of Exhibit A?

Ans. The term quack medicine is simply a slang phrase, and is applied generally to articles, the constituent parts of which are not known.

Ques. (Question repeated.)

Ans. This medicine does not profess to cure all diseases, it only professes to cure that class of diseases arising from constipation of the bowels or impurity of the blood.

Ques. Some years ago, were not there two articles put up in a style like Exhibit A, with the same or substantially the same words on the label, sold in the market at different prices at or about the same time?

(Objected to as immaterial, irrelevant.)

Ans. I don't recollect.

Ques. Has the price always been uniform?

(Same objection.)

Ans. To the best of my knowledge the retail price has always been the same.

Ques. How as to price per gross?

(Same objection.)

Ans. The price per gross has been reduced; has not been uniform; it is now advanced again; the price was reduced but has now increased. I understand that since it came into the possession of the Manhattan Co., the price has been raised from $18 to $27.

Direct resumed by Mr. CHASE:

Ques. Do you know how long the price was held at $18?

Ans. No, sir.

Ques. Was $27 the old price of the article?

Ans. I cannot tell.

GEORGE SOLE.

88 *Deposition of John G. Hassard.*

JOHN G. HASSARD, being duly sworn, testified as follows:

Questions by complainant's solicitors:

Ques. Where do you reside?

Ans. In Brooklyn, N. Y. I do business in New York.

Ques. Are you acquainted with the article of medicine called Atwood's Vegetable Physical Jaundice Bitters?

Ans. Yes, sir.

Ques. How long have you been acquainted with it?

Ans. I should say about twenty years.

Ques. In what way have you been acquainted with it?

Ans. In buying and selling it.

Ques. When and where did you first commence to sell it?

Ans. I think I first commenced to sell it when I was an apprentice in an apothecary store.

Ques. Where?

Ans. Providence, Rhode Island.

Ques. How many years ago?

Ans. About twenty years.

Ques. How many years did you sell the article in Providence?

Ans. About six years.

Ques. Where did you next sell it?

Ans. In Boston.

Ques. How long did you sell it in Boston?

Ans. About four years.

Ques. In what way did you sell it in Providence?

Ans. Both at retail and to the wholesale trade.

Ques. State about what years you sold it in Providence?

Ans. I think from 1851 to 1858.

Ques. Where did you obtain the article when you sold it in Providence?

89 Ans. From a wholesale druggist in Providence.

Ques. In what way did you sell it in Boston?

Ans. At wholesale.

Ques. What years did you sell it in Boston?

Ans. 1862, '63, '64, '65, '66.

Ques. From whom did you obtain your supplies for the Boston trade?

Ans. M. Carter & Sons, of Georgetown, Mass.

Ques. To what places did you send the article when you were selling it in Boston?

Ans. Generally over New England.

Ques. State whether the sales of the article were large when you were selling it in Boston.

Ans. Yes; it had a large sale.

Ques. Where did you sell it after you sold in Boston in the years mentioned?

Ans. Generally in New England, and I have continued selling it up to the present time. I sold some in New York State.

Ques. From whom have you obtained your supplies of the article since the year 1866?

Ans. Part of the time from Manhattan Medicine Co.; the rest of the time, I think, from M. Carter & Sons, but am not positive.

Ques. State in what manner and style the article has been put up, in respect to description of bottle and label and name.

Ans. I have always seen it put up in style of Exhibit A, Feb. 41, 1876.

Ques. Has this article, put up in the manner and style of Exhibit A, been a well known, popular, and well established article in the trade for many years?

(Objected; leading and calling for inference.)

Ans. It has.

90 Ques. State whether the article has been extensively advertised or not.

Ans. It has.

Ques. State whether the sales of the article have been very large for many years.

Ans. They have.

Ques. State whether you have ever known the genuine Atwood's Bitters to be put up in any other style or form than as Exhibit A.

(Objected to; witness not qualified.)

Ans. I never did.

Ques. State whether, with your experience in the proprietary medicine trade, you consider yourself an expert in regard to proprietary medicines, as to form and style in which they are put up and sold.

(Objected to, calling for witness's opinion as to his own qualification.)

Ans. Yes; I ought to be as much as apothecaries generally. I have been in the drug business all my life.

Ques. State whether you have always been familiar with articles of the proprietary medicine trade.

Ans. I have.

Ques. State whether, in your opinion, Exhibit B, now shown you, from its similarity of name, would be likely to deceive and mislead people into purchasing it for article Exhibit A.

(Objected to, leading and reasoning of witness.)

Ans. I think it would.

Ques. State whether or not the article is bought by many persons who are not familiar with the particular style of bottle or label, but know it only from its general character or reputation.

(Objected; witness cannot know.)

Ans. Of course it is; necessarily so.

91 Ques. State whether a person having Atwood's Bitters recommended to him as a medicine, and not particularly acquainted with the form and style of the bottle and label, and seeking the article from a druggist or dealer, and the article, Exhibit B, was passed to him in answer to his call for Atwood's Bitters, would he or not be likely to purchase such article, Exhibit B, supposing that he had purchased the genuine Atwood's Bitters, Exhibit A.

(Objected; law, matter of reasoning, and argument hypothetical.)

Ans. Undoubtedly; necessarily he would.

Ques. State whether, in your opinion, many people are so deceived into purchasing defendants' article, Exhibit B, as and for complainant's article, Exhibit A.

(Objected to as calling for opinion and not facts.)

Ans. I think they are.

Ques. Why do you think so?

(Objected to as calling for reason, for opinion.)

Ans. In the first place, the bottles are similar in size; the labels are of the same color and general form, and the caption on the label is the same; and that many unscrupulous sellers are accustomed to say, in selling an imitation article, while the form of the bottle and style of the label are slightly different, that it is the genuine article, but a new style; the proprietor has changed his style. Any consumer takes it right off.

Ques. State whether the business of making and selling a genuine article of medicine is greatly injured by the sale of an imitation article.

(Objected to, calling for reasoning.)

Ans. Certainly it is.

Ques. State in what way.

(Same objection.)

Ans. Because the imitation injures the reputation of the genuine.

92 Ques. Is or is not the loss resulting from the sale of such imitation article to the manufacturer of the genuine article much in excess of the mere profits which he, the genuine manufacturer, would make on a quantity of the genuine article equal to the quantity of the imitation article sold?

(Same objection, and leading and argumentative.)

Ans. It is; the loss is twofold. It not only decreases the sales of the genuine article to the amount of the sale of the imitation article, but by injuring the reputation of the genuine article destroys its sale altogether.

Cross-examination by Mr. CLIFFORD:

Ques. Are you a member of or employed by the plaintiff company?

Ans. I am not.

Ques. Same question as to John F. Henry, Curran & Co.

Ans. I am a salesman in the house of J. F. Henry, Curran & Co., and this is the fourth year of my employment by them.

Ques. When you were selling the bitters in Providence, from 1851 to 1858, did you ever hear any person claim a right to any trade-mark on the medicine?

Ans. I don't recollect any conversation with any person on the subject.

Ques. Did you hear of any claim of that kind during that seven years that you can remember?

Ans. I don't remember of any.

Ques. To your knowledge, were or not, during that time, the bitters put up by several persons?

Ans. I only know of one; Moses Atwood.

Ques. Where?

Ans. Georgetown, Mass.

Ques. From 1862 to 1866, did you hear of any claim of any person to such trade-mark?

Ans. Never heard it talked of.

93 Ques. During this time were or not the bitters put up by several persons to your knowledge?

Ans. Not to my knowledge.

Ques. Did you hear of who were putting them up? If yea, state who you heard.

(Objected; hearsay.)

Ans. M. Carter & Son.

Ques. Anybody else?

Ans. I heard of no one else.

Ques. From 1866 to 1870 did you know or hear of others putting them up at Georgetown and other places?

Ans. I did not.

Ques. From 1851 to 1866 did you know the contents of any of the bottles that you sold as Atwood's Bitters?

Ans. I did not.

Ques. Did you know then whether the bottles contained Atwood's Bitters at all?

Ans. We bought one kind all the time, and consequently presumed they were genuine, as they came from one source.

Ques. From source do you mean Georgetown?

Ans. Yes, sir.

Ques. Was not the fact of their coming from this source a guarantee of their genuineness in your mind?

Ans. Partially it was, coupled with the name of Moses Carter & Sons that we had them of.

Ques. Did those two things satisfy your mind as to the genuineness?

Ans. Yes.

Ques. Did you ever buy, ever with Carter and Dodge's name on them?

Ans. I could not say whether I ever did or not; possibly the bitters that we used to buy in Providence may have had Dodge's name on them, but I cannot say positively as to that.

94 Ques. But when you bought while you were in Boston you depended upon the Carter name as the manufacturers, did you not?

Ans. Yes.

Ques. Do you know whether, during this time, the trade generally depended upon the Carter name as the manufacturers?

Ans. I do not.

Ques. Did you ever hear these bitters called for and the buyer ask

for them as put up by Carter, or Carter & Son, and how was it generally in the trade as to this, if you remember?

Ans. I have heard them call for M. Carter & Son's, and, generally, in the trade the call was for Atwood's Bitters.

Ques. Do you think that any person who read the label of Exhibit B would think it was the same as Exhibit A?

Ans. I do, most assuredly.

Ques. Do you think so if he read the whole of both?

Ans. Yes.

Ques. State whether, while you have been acquainted with these bitters, you have regarded them or not as a quack medicine.

Ans. I have always regarded them as a valuable proprietary medicine.

Ques. Do you remember whether, from 1851 to 1856, there were bottles in the market purporting to contain the same as Exhibit A, and were similar in appearance and label, selling at or about the same time at different prices per gross?

Ans. I do not remember.

Ques. What was the old price from 1851 to 1868–'9 per gross? Was it uniform? What is it now?

Ans. To the best of my knowledge the old original proprietor's price was $27; how long that continued I cannot say. I cannot say about the uniformity of the price. It is now $27.

Ques. Did you ever know of the bitters being sold for $18?

95 (Objected to as irrelevant and immaterial.)

Ans. They were sold for about $18 for a while.

Ques. How long, if you remember? State as nearly as you can.

(Same objection.)

Ans. I can recollect of its being sold for that since I have been with John F. Henry, Curran & Co., until the advance took place.

Ques. Can you remember for how long?

(Same objection.)

Ans. During 1873, '74, '75, until the advance took place.

Ques. Do you know how they sold in 1868, '69, '70?

(Same objection.)

Ans. I do not.

Ques. How from '62 to '66?

(Same objection.)

Ans. Do not remember.

Ques. When did the advance take place.

(Same objection.)

Ans. I think in 1875; I should say in the first half of the year.

Ques. Have you ever seen any of the bitters with Bateman's name on the label?

Ans. I think I have.

Ques. Do you not know that they are specified by his name when they were bought and sold?

Ans. I never had them called for by his name, to the best of my recollection.

Ques. Were they regarded as genuine?

Ans. I cannot say.

Ques. Have you seen in the trade the Mystic Bitters?

Ans. I have.

Ques. Are they not designated by that name, Mystic?

96 Ans. I have heard parties speak of being able to buy the bit-

ters put up at Mystic for a less price. We asked them for what we called the genuine.

Ques. How long ago was that?

Ans. I think in 1875.

Ques. Were the Mystics regarded as genuine in the trade?

Ans. I think not.

Ques. Of what brand do you speak in your former answer when you use the word genuine?

Ans. M. Carter & Sons.

Ques. Why were the Mystics not deemed genuine?

Ans. I do not know.

Ques. How much less did they sell per gross than the M. Carter & Sons?

Ans. I do not know.

Ques. Has any one ever told you how much less; if yea, who and how much did he or they say the difference was?

(Objected; hearsay and irrelevant and immaterial.)

Ans. Yes, a party told me that they could buy them for sixteen dollars.

Ques. Did or not these different brands, M. Carter & Son's, Bateman, and Mystic, have a bottle and label in their general appearance like Exhibit A?

Ans. I think they did.

Ques. Do you remember if the Mystic had Georgetown, Mass., on them?

Ans. I do not remember.

Direct resumed:

Ques. When the complainants' article is mentioned or referred to in the trade, by what name is it called?

Ans. Atwood's Bitters.

Ques. Has it always been so designated since you became acquainted with it?

Ans. It has.

97 Ques. When you speak of the marks of the genuineness of complainants' articles, do you, or not, also refer to the peculiar form of the bottle and the words blown in the glass, and the color and words on the label, as marks of such genuineness?

(Objected, leading.)

Ans. I refer to the bottle as being a fluted bottle. Yes; and the words blown in the glass. I refer to the form of the bottle, the words blown in the glass, and the style of the label.

Ques. Have you seen the defendants' article put up in the fluted or twelve-sided bottle, with the label thereon, similar to Exhibit A?

Ans. I have not.

Ques. During the time that you were engaged in selling Atwood's Bitters, from 1851 to 1875, did you ever hear the exclusive trade-mark rights of Moses Atwood and his successors, Carter, Dodge & Co., and others, to the complainants' article called in question, or disputed?

(Objected to as assuming fact and leading.)

Ans. I never did.

Ques. Were such exclusive trade-mark rights always respected and observed by the trade generally, so far as you know?

Ans. I think they were.

Ques. Is it not true, in the proprietary medicine trade, that all articles of considerable importance have more or less spurious imitations?

(Objected, immaterial.)

Ans. It is.

Ques. Is not a popular, valuable, and well-established article more likely to have imitations than others?

(Same objection.)

Ans. It is.

98 Ques. Have you any personal knowledge as to whether the Mystic parties derived their right to put up and sell said Atwood's Bitters from Carter, Dodge & Co.?

Ans. None whatever.

Ques. Have you any personal knowledge as to Bateman's rights to put up and sell said Atwood's Bitters?

Ans. None, whatever.

Ques. Did you always recognize Carter, Dodge & Co. and their successors as the rightful and exclusive owners of the trade-marks of said Atwood's Bitters?

(Objected, immaterial, and including what witness does not know.)

Ans. I always did.

Cross resumed:

Ques. Is there any other thing besides form of bottle, words blown in glass, words and color on label, to which you refer, as showing genuineness in Exhibit A?

Ans. John F. Henry's private stamp.

JOHN G. HASSARD.

Circuit court of the United States for the district of Maine.

THE MANHATTAN MEDICINE COMPANY
vs.
NATHAN WOOD ET AL.

Testimony in the above suit taken before me, a special examiner, pursuant to the annexed commission, at my office, 33 School street, in the city of Boston, commonwealth of Massachusetts, on the 28th day of March, A. D. 1876.

PHILO CHASE, Esq., counsel for plaintiff; W. H. CLIFFORD, Esq., counsel for defendants.

99 *Deposition of Luther F. Carter.*

LUTHER F. CARTER, of Georgetown, said Massachusetts, being called by the plaintiff, and by me duly sworn according to law, testified as follows:

Examined by MR. CHASE:

Ques. 1. Where do you reside?

Ans. Georgetown, Mass.

2. How long have you resided there?

Ans. Thirty-nine years.

3. What is your age?

Ans. Thirty-nine years, which is all my life.

4. Are you acquainted with the article of medicine in question in this suit, commonly called Atwood's Bitters, and designated as "Atwood's Vegetable Physical Jaundice Bitters?"

Ans. I am.

5. How long have you been acquainted with it?

Ans. Twenty-five years.

6. When and how did you become acquainted with it first?

Ans. Some twenty-five years or more ago, when Moses Atwood was engaged in putting it up alone, as far as I know.

7. Was he the Moses Atwood whose name appears on the label on the bottle marked Exhibit A, February 14, 1876, now shown you?

Ans. He was the same Moses Atwood.

8. State when, as nearly as you can, that Moses Atwood left off making and selling said article of medicine at Georgetown.

Ans. About 1855.

9. State when said Moses Atwood began to put up and sell said article of medicine.

100 Ans. I have heard him say he commenced in about 1842.

(Objected to as hearsay.)

10. How long ago did you first hear Moses Atwood say he began to put up said medicine in 1842?

(Objected to as above.)

Ans. I could not state the time; I think, about February, 1875.

11. Does Moses Atwood now reside in Georgetown; and, if not, how long since he resided there, and where does he now reside?

Ans. He does not now reside in Georgetown; he has not resided there since 1855. He now resides in New Sharon, Milwaukee County, Iowa.

12. When Moses Atwood resided at Georgetown, did you live a neighbor to him, and if so, how long?

Ans. I did; from twelve to fifteen years.

13. Were you, during all that time, well acquainted with him and his business?

Ans. He was a man and I a boy, and I knew him as such. I knew he manufactured and sold said medicine.

14. Did you ever work for said Moses Atwood, or assist him in his business while he was putting up and selling said medicine at Georgetown?

Ans. I have worked for him putting up the medicine.

15. When did you so work for him?

Ans. Well, somewhere from 1850 to 1853.

16. How much did you work for him in putting up said medicine, between 1850 and 1855?

Ans. I should say from three to six months.

17. How old was you when you so worked for him?

Ans. Some fourteen or fifteen years old.

18. What did you do in respect to putting up said medicine while so working for Atwood?

Ans. I drew the medicine from a cask, filled the bottles,

101 corked, sealed, and labeled them, in connection with my brother.

19. Describe the bottle and label as then used by said Atwood in putting up said medicine.

(Objected to as immaterial.)

Ans. It was a round, smooth, plain, eight-ounce bottle, no lettering. The label was similar to the label on said Exhibit "A."

20. How did said bottle compare in size, thickness, and height with said bottle, Exhibit "A"?

(Objected to as above.)

Ans. Bottle was about same size and height, and a little less in diameter.

21. What marks, if any, did this round bottle have on it?

(Objected as above.)

Ans. Not any.

22. What kind of label was used on it?

(Objected as before.)

Ans. A label similar to the label on said Exhibit "A," and I think precisely the same reading; I think a little narrower and longer, and about the same color.

23. Did said Atwood used the fluted bottle like Exhibit "A" before quitting the business at Georgetown?

(Objected as before.)

Ans. He did.

24. When, according to your recollection, did Atwood begin to use the fluted bottle?

Ans. I think sometime between 1852 and 1853 and 1855.

25. Who carried on the business of making and selling Atwood's Bitters immediately after Atwood left Georgetown?

Ans. Carter & Dodge.

26. Who composed the firm of Carter & Dodge?

102 Ans. Moses Carter and Benjamin S. Dodge; said Carter was my father. They resided and carried on business in Georgetown; that is, my father resided in Georgetown, and Dodge resided in Rowley, about three miles away.

27. State whether or not Carter & Dodge had an interest in the business of putting up and selling said bitters prior to 1855, and how long prior, and what such interest was, if any.

(Objected to as calling for secondary evidence.)

Ans. They had, and from two to three years prior. They had a formula and the right to make and sell the medicine on territory that Moses Atwood sold them prior to 1855.

(Answer objected to.)

28. State from whom Carter & Dodge obtained formula for making said medicine, and the right to sell on such territory.

(Objected to as above.)

Ans. From Moses Atwood.

29. What additional rights, if any, in respect to said medicine, did said Moses Atwood sell to Carter & Dodge when he retired from the business in 1855?

(Objected as before.)

Ans. He sold them all his right, title, and interest, reserving the right to manufacture and sell in the West if he chose.

30. How long did the firm of Carter & Dodge carry on said business?

Ans. I should think about three years.

31. What, if any change was then made in the firm of Carter & Dodge?

Ans. They took in as partner my brother, Charles L. Carter, under the firm name of Carter, Dodge & Co.

32. And how long did the firm of Carter, Dodge & Co. continue?

Ans. Should think about two or three years.

103 33. What form of bottle and kind of label did Carter & Dodge use with said bitters?

(Objected to as immaterial.)

Ans. They used, to start with, the old-fashioned, round, plain, straight bottle, the same as I have described Atwood used, and afterwards the eight ounce bottle, fluted like Exhibit "A." The label was similar to what I have described before on Exhibit "A."

34. What kind of bottle and label did Carter, Dodge & Co. use?

(Same objection.)

Ans. The eight-ounce fluted bottle—same as Exhibit "A," and same label.

35. When the firm of Carter, Dodge & Co. dissolved, what, if any, arrangement was made in respect to said business?

(Objected to as immaterial and calling for hearsay.)

Ans. It was a mutual arrangement and understanding that each member of the firm should manufacture and sell the medicine on certain prescribed territory.

36. How was the arrangement in regard to the use of the formula for making the medicine and the label and bottle, &c.?

(Same objection.)

Ans. Each was to use the same bottle, formula, and label by mutual understanding.

37. Now, after the dissolution of Carter, Dodge & Co., and this arrangement, how was said medicine put up and sold?

(Same objection.)

Ans. It was put up same as before, and manufactured and sold by M. Carter & Son and Benjamin S. Dodge.

38. Who composed M. Carter & Son?

Ans. Moses Carter and Charles L. Carter.

39. How long did M. Carter & Son carry on the business?

104 Ans. I should think about five years.

40. What change then took place?

Ans. Charles L. sold out his interest, and the firm became M. Carter & Sons.

41. Who composed the firm of M. Carter & Sons?

Ans. Moses Carter, Luther F. Carter, and Moses F. Carter, said Luther being myself.

42. How long did M. Carter & Sons, as so composed, carry on the business?

Ans. Two or three years.

43. What change then took place in the firm of M. Carter & Sons?

Ans. My father, Moses Carter, died in 1870, and the next year I bought out the interest of my brother, Moses L. Carter, and continued the business under the name of M. Carter & Son until April 1, 1875. I sold all my right, title, and interest in the business to the Manhattan Medicine Company, the plaintiff in this suit.

44. When your father died, what became of his interest in the firm of M. Carter & Sons?

Ans. He made a will, and gave all his interest in the business, after paying certain legacies, to me and my brother, Moses L. Carter.

(Objected to as secondary.)

45. Did you pay the legacies according to the provision of the will?

(Same objection.)

Ans. I did.

46. Did you and your brother have the undisputed possession and ownership of the entire business and property of M. Carter & Sons after the decease of your father?

(Same objection and incompetent.)

Ans. We did.

(MEM. BY EXAMINER.—It is hereby stipulated by the counsel
105 of the respective parties, that copies of certain original papers may be annexed to the several depositions in this cause, and used as competent evidence in the cause, the due execution and delivery thereof being admitted, such copies being compared and certified

by the examiner, this stipulation applying to such papers as shall hereinafter be designated, and it is agreed that this stipulation shall apply to a certain conveyance from Luther F. Carter to the Manhattan Medicine Company, dated April 1, 1875.)

47. State whether the paper last-above described, now shown you, was executed and delivered by you to the plaintiff.

Ans. It was.

48. Who, if any one, at Georgetown, besides said Moses Atwood, and Carter & Dodge, and Carter, Dodge & Co. and successors, made and sold said medicine?

Ans. Lewis H. Bateman.

49. How long did Bateman make and sell it?

Ans. From about the year 1855 or '6 until his death in 1871, and his son, Lewis H. Bateman, continued the business until he sold to the plaintiff, about same time we did.

50. What style of bottle and label did Lewis H. Bateman and his son and successor, Lewis H. Bateman, use?

Ans. Same as said Exhibit A.

51. Did M. Carter & Sons or M. Carter & Son use any distinguishing marks on this medicine put up and sold by them; if so, what?

Ans. They did. They used the same label with a heading, reading, Carter's are the only genuine, and then it went on and read the same as Exhibit A.

52. Why did you use the name of Carter on the label?

(Objected to as immaterial.)

Ans. I used it more particularly to designate our own manufacture from those of Lewis H. Bateman's manufacture, who was our greatest competitor.

106 53. What distinguishing mark, if any, did Bateman use on his bitters?

Ans. He used his name, printed in red ink across the label.

54. By what right did Bateman claim to use the same style of bottle and label as the successors of Moses Atwood?

(Objected as hearsay and otherwise incompetent.)

Ans. Bateman claimed to have acquired the right by commencing the business and making and putting up the medicine in connection with Moses Atwood.

55. Did Bateman claim any other right to use said style of bottle and label than what he had derived from his connection with Moses Atwood, as you have stated?

(Same objection.)

Ans. He did afterwards.

56. What do you mean by afterwards?

Ans. I mean that Bateman's right was contested at law, and Carter & Dodge were nonsuited, and at that time Bateman claimed that the court gave him the right to use the trade-mark and make the medicine.

57. And is that what you mean by your answer to the 55th interrogatory?

Ans. It is.

58. After the dissolution of Carter, Dodge & Co., did Benjamin S. Dodge make and sell said bitters?

Ans. He did.

59. How long?

Ans. I should think about five years.

60. Where did Dodge carry on the business?

Ans. At his place in Rowley.

61. What style of bottle and label did he use?

Ans. The same as Exhibit A.

62. Did he make as much as the Carters?

Ans. I think he did not.

107 63. Did he in any way distinguish the bitters put up by him?

Ans. I don't know that he did.

64. Did any other party or parties put up and sell said bitters in connection with or as successors of said Dodge; if so, who?

Ans. Two parties did as successors to Benj. S. Dodge, one party at Mystic, Conn., Noyes & Manning, and the other party was William B. Dorman, at Georgetown.

65. What style of label and bottle did Noyes & Manning use?

Ans. Same as Exhibit A.

66. What style and label did Dorman use?

Ans. Same as Exhibit A.

67. Up to what time did Noyes & Manning and Dorman make and sell said bitters in the manner you have described?

Ans. Up to about April 1, 1875.

68. Did any other parties besides those you have named claim the right to make said Moses Atwood's Bitters, and to use the styles of bottles and labels you have mentioned?

Ans. Not to my knowledge.

69. Did you ever hear of any such claim until set up by the defendants in this suit?

Ans. I did not.

70. Did or not Carter & Dodge and their successors and Bateman always claim to be the exclusive owners and proprietors of the trade-marks of said medicine?

(Objected to as to form.)

Ans. They did claim to be the exclusive owners of said trade-marks.

71. Did you know Moses F. Atwood, a son of said Moses Atwood; if so, when, where, and how long did you know him?

108 Ans. I did know him as a boy at Georgetown, from 1845 to 1855, and afterwards, a few years later, while we worked for Bateman, at Georgetown.

72. How old was said Moses F. Atwood in 1855, when his father, Moses Atwood, left Georgetown?

Ans. I should think about fifteen years old.

73. When said Moses Atwood moved away from Georgetown to Iowa, did he take his family with him?

Ans. He did.

74. Did said Moses F. Atwood go away West with the rest of the Atwood family?

Ans. He did.

75. What was said Moses F. Atwood doing before the family moved away from Georgetown?

Ans. He was a boy attending school, and running about the streets when not at school. He might have assisted his father some.

76. Did said Moses F. Atwood afterwards return to Georgetown; if so, when, how long did he stay, and what did he do?

Ans. He did afterwards return to Georgetown, some two or three years after he left in 1855, and staid some two or three years, and was at work for Lewis H. Bateman, bottling up the bitters, and a part of the time, last part, traveling for him, selling the medicine.

77. Did said Moses F. Atwood then return West again?

Ans. He did.

78. Has he ever again returned to Georgetown?

Ans. Not to my knowledge.

79. Were you well acquainted with said Moses F. Atwood during all the time he lived at Georgetown, both before and after 1855?

Ans. I was.

80. State whether or not said Moses F. Atwood ever claimed any right, title, or interest in the said bitters business or in said trade-marks.

109 (Objected to as immaterial.)

Ans. I never knew that he did.

81. Did or not you ever hear of said Moses F. Atwood's ever claiming any right, title, or interest in such business or trade-marks?

Ans. I never did.

82. Did you ever hear of any person or persons claiming any right, title, or interest in or to the business of making said Atwood's Bitters, or in or to said trade-marks, or any of them, by, through, or under said Moses F. Atwood, until set up by the defendants in this suit?

(Objected to as before.)

Ans. I did not.

83. If said Moses F. Atwood had ever claimed any such right, title, or interest, would you or not have known it?

(Same objection.)

Ans. I think I should have known it.

84. Why should you think you would have known it?

(Same objection, and calling for reasoning.)

Ans. I should have heard of his setting up such a claim by being well acquainted with him.

85. And would or not the fact of your being engaged in the business and part owner in it, have been an additional reason of your knowing it, if any such claim had ever been made by said Moses F. Atwood?

(Objected to as calling for reasoning, leading in form, immaterial, uncertain, and without the knowledge of the witness.)

Ans. At that time I was not a part owner in the business, and was engaged at work for Carter, Dodge & Co., or M. Carter & Son, I think, both covering that period, but saw Moses F. Atwood frequently, and never heard him claim any rights in the business or trade-marks whatever.

110 86. State whether or not the label now shown is a sample specimen of the labels used by said M. Carter & Son on said Atwood's Bitters, as hereto annexed, marked Plaintiff's Exhibit D, March 29, 1876.

Ans. It is.

Plaintiffs' Exhibit D, March 29, 1876.

CARTER'S ARE THE ONLY GENUINE

ATWOOD'S

VEGETABLE PHYSICAL JAUNDICE BITTERS.

This is an effectual cure for jaundice, headache, dyspepsia, worms, dizziness, loss of appetite, darting pains, colds, and fevers; it cleanses the blood from humors, and moistens the skin. It is also good for liver complaints, stranguary, dropsy, croup, and phthisic.

Dose for an adult, from half a table-spoonful to half a wine-glassful, according to the strength of the patient.

DIRECTIONS.—For jaundice or headache it should be taken every morning, half an hour before eating. For dyspeptic complaints, spitting up food and distress at the stomach, take a tea-spoonful immediately after eating. For worms, or any sudden attack of pain in the stomach, it should be taken immediately. For fevers it should be taken in large doses, once in four hours, while it operates smartly as physic; at the same time take a good sweat—then continue taking a little bitters every morning, sufficient to keep the bowels in good order. For liver complaints it should be taken the same as in dyspepsia, at the same time applying one of Atwood's Strengthening Plasters between the shoulders, and wherever the patient has the most pain, which
111 generally effects a cure in a short time, if administered in season. It is safe in all cases, and meets the approbation of all who have had an opportunity of using it.

Manufactured by M. CARTER & SON,
(Successors to Moses Atwood), GEORGETOWN, MASS.,
And sold by their agents throughout the United States.

Caution.—Observe that our name is blown in the bottle, and also on the revenue stamp over the cork.

NONE OTHERS ARE GENUINE.

87. And is this the label referred to by you in the former part of this deposition as the one used by Carter & Son?

Ans. This is the same as referred to in my answer to the 51st interrogatory.

88. State whether or not said medicine was extensively advertised by the said successors of Carter, Dodge & Co.

Ans. It was.

89. In what ways was it advertised?

Ans. By cards, circulars, posters, and some newspaper advertisements.

90. State whether or not there was much counter advertising of said article between said M. Carter & Son or M. Carter & Sons and said L. H. Bateman.

Ans. There always was.

91. State whether or not the circular now shown you, and hereto annexed and marked "Plaintiffs' Exhibit E, March 29, 1876," is one of said Bateman's circulars, issued by him.

Ans. It is.

112 *Plaintiffs' Exhibit E, March 29, 1876.*

To venders and consumers of Atwood's Vegetable Physical Jaundice Bitters! and the public generally.

The great popularity of these bitters, now continued for nearly thirty years, while it induces the base and unprincipled to make and vend worthless and deleterious imitations, tends to defraud the sick, not only of their money, but of that vigorous health which Atwood's Genuine Bitters would help them regain.

L. H. Bateman, of Georgetown, Mass., commenced the manufacture of Atwood's Bitters in connection with Moses Atwood, whose name they bear, in 1842, and has continued their manufacture to the present time, putting them up in half-pint glass bottles, with the words "At-

wood's Jaundice Bitters, Moses Atwood, Georgetown, Mass.," blown upon the bottles.

When Moses Atwood removed from Georgetown to Iowa, in 1855, he left with Bateman his original recipe for the manufacture of Atwood's Bitters, as he did of all the medicines manufactured and sold by him. Since his removal in 1855, Moses Atwood has not carried on business in Georgetown, or even been in the place.

Certain other parties, under the various names of Carter, Dodge & Co.; M. Carter & Sons; M. Carter & Son, have manufactured and sold what they claimed to be the genuine Atwood's Bitters; sometimes under the names of Atwood's Bitters, and sometimes by the name of Carter's Atwood's Bitters. These parties, or some of them, have at times claimed and published that they had the exclusive right to manufacture and sell Atwood's Bitters; that the name Atwood's Bitters, as a
113 trade-mark, was their exclusive property, and that Bateman had no right to use Atwood's name in the manufacture and sale of the bitters, and was not authorized to manufacture and sell in any way. And they printed and caused to be circulated a card to the public, dated August 12, 1857, purporting to be signed by Moses Atwood, cautioning the public against buying medicines manufactured by Bateman, as he had never imparted to him the knowledge of their manufacture.

To enforce their claims, and to restrain Bateman from the manufacture and sale of Atwood's Bitters and the use of Atwood's name, M. Carter, Dodge & Co. brought a bill in equity in the supreme judicial court for Essex County, in the year 1857, and also a suit at law for the recovery of damages in the same court upon the same grounds.

On the 19th day of May, 1857, their prayer for an injunction after a hearing by the court was refused, thereby sustaining the right of Bateman to make and sell the genuine Atwood's Bitters, and to use Atwood's name as his trade-mark.

Carter, Dodge & Co. became non-suit in their bill in equity June 2, 1860, paying Bateman costs of suit, and abandoned their suit at law November 12, 1860, as appears by the records of the court. And it is a fact not to be forgotten that during all the time these legal proceedings were in progress Moses Atwood was living in Iowa, and they neither produced him nor his deposition to substantiate their claims on his oath, or to deny Bateman's, or any of the foregoing facts.

These efforts to deprive Bateman, by legal means, of his honestly acquired right to make and sell the genuine Atwood's Bitters and to use Atwood's name as a trade-mark in doing the same, resulted in establishing the claims of Bateman, and refuting the allegations of his enemies by the judgment of the court. But certain of these parties, although convinced as they must have been, and are now,
114 of the justice and legality of Bateman's claims, and convicted of the falsity of their charges, have not been converted to honorable men. Means most foul, allegations most false, circulars most slanderous have been published to deprive L. H. Bateman of his legally-established rights, and to cheat and defraud the public, his name has been used without his knowledge; worthless, if not absolutely injurious, bitters, put up in a manner calculated to induce the belief that they were manufactured by him, have been sold in the market in any quantity and at prices lower than the cost of manufacture of the genuine bitters, to injure him and prevent the sale of the genuine Atwood's Bitters, honestly manufactured according to the original recipe from the best materials.

The public, and all using Atwood's Bitters, are cautioned that they may be on their guard against these and similar tricks, and not be deceived to their hurt.

☞ The only safe way is for agents to send all orders to the subscriber and consumers to purchase only those in half-pint glass bottles with the words "Atwood's Jaundice Bitters, Moses Atwood, Georgetown, Mass.," blown in the bottle; and hereafter a fac-simile of the signature of L. H. Bateman, printed with red ink across the directions upon the label.

Address,

L. H. BATEMAN,
Georgetown, Essex County, Mass.

92. When was this circular issued by Bateman?

Ans. It was issued since the suit in Essex County, Mass., was commenced between Carter, Dodge & Co. and Bateman, as stated in the circular.

93. Did or not Carter & Sons issue counterblasts to this circular?

Ans. They did.

115 94. State whether the bottle and label thereon now shown you, and marked Plaintiff's Exhibit F, March 29, 1876," is a sample specimen of the old bottles and labels first used by Moses Atwood, and to which you referred in your answer to the 19th interrogatory.

Ans. It is.

(MEM. OF EXAMINER.—It is stipulated that the bottle exhibits need not be attached to the deposition.)

95. State whether or not the business of making said Atwood's Bitters was extensively carried on by the several successors of Carter, Dodge & Co. and said Bateman.

Ans. It was.

96. To what parts did they send said article?

Ans. Throughout New England and some of the Middle and Western States and some to the British Provinces.

97. State whether or not the business gradually increased up to the time of its transfer to the plaintiff.

(Form objected to.)

Ans. It did.

98. Describe the business of M. Carter & Son as to its extent.

Ans. They sold between 400 and 500 gross of the bitters during the year previous to the sale to the plaintiffs.

99. State whether the business was profitable or otherwise.

Ans. The business was not profitable, on account of so much competition between these several parties I have named.

100. How long have you been engaged in the proprietary-medicine business?

Ans. As boy and man, for twenty-five years.

101. Have you been engaged in making and selling different kinds of proprietary medicines?

Ans. I have.

102. How long.

Ans. Some eight or nine years.

116 103. Are you acquainted with said Atwood's Bitters, as now made and sold by the plaintiff?

Ans. I am.

104. Are you acquainted with an article made and sold by the de-

fendants, also called Atwood's Bitters, or Atwood's Vegetable Physical Jaundice Bitters?

Ans. I am somewhat; I have seen them in the market for sale.

105. Judging from your knowledge and experience in the proprietary-medicine trade, what, in your opinion, is the effect of the defendants' article in their round bottles, in respect to deceiving the purchasers, or those intending to be purchasers of the plaintiff's article?

(Objected to as calling for opinion, hypothetical, irrelevant, and as to form.)

Ans. I think purchasers would be likely to be deceived in buying the article, especially those who were not well acquainted with the article.

(MEM. OF EXAMINER.—It is agreed by the parties that, under the foregoing stipulation, may put in evidence, and it does so put in, the plaintiff, an assignment by M. Frank Carter to Luther F. Carter, dated March 1, 1875; and also an assignment from said Luther F. Carter to the plaintiff, dated April 19th, 1875, but defendant, that is, the formal execution of deeds being admitted, *but the defendants* waive no objection to the sufficiency of the deeds or to the right and power of the grantors to convey what they purport to convey.)

106. Is the M. Frank Carter named in the assignment or deed last above referred to your brother, who was a member of the firm of M. Carter & Sons?

Ans. Yes.

107. Had your brother, M. Frank Carter, previously conveyed to you his interest in the business of making Atwood's Bitters?

117 Ans. He had.

108. And was it the purpose of this assignment to convey by writing what he had previously conveyed to you verbally?

(Objected to as matter of law.)

Ans. It was.

109. When was it your brother, M. Frank Carter, sold out his interest in the business to you?

Ans. About three years previous to the date of said assignment.

110. Are you the Luther F. Carter who executed the assignment of Luther F. Carter to the plaintiff, dated April 19, 1875?

Ans. I am, and delivered it to the plaintiff.

111. Are you the Luther F. Carter who executed the assignment or deed from Luther F. Carter to the plaintiff, dated April 1, 1875, and already put in evidence?

Ans. I am, and I delivered it to the plaintiff.

(EXAMINER'S MEM—Plaintiff, under the foregoing stipulation, puts in evidence an assignment or deed from Charles L. Carter, Mary A. Titcomb, and Sarah P. Osgood to the plaintiff, dated April 12, 1875.)

112. Who are the said Charles L. Carter, Mary A. Titcomb, and Sarah P. Osgood who executed this paper?

Ans. They are my brother and sisters.

113. Is the Charles L. Carter the same Charles L. Carter who was formerly a member of the firm of Carter, Dodge & Co. and of M. Carter & Son?

Ans. Yes.

114. State whether you, M. Frank Carter, Charles L. Carter, Mary A. Titcomb, and Sarah P. Osgood are all the heirs that there are of your late father, Moses Carter.

Ans. They are.

115. Why was this last paper executed?

(Objected to as immaterial.)

118 Ans. The plaintiff wanted it to show that my brothers and sisters would not set up any claim hereafter, and they gave it freely.

(MEM. OF EXAMINER.—Plaintiff puts in evidence under the foregoing stipulation a contract executed by Moses Atwood and Moses Carter, dated January 1, 1848.)

116. Were you the executor of your father's estate?

Ans. I was.

117. Have you seen the paper last above referred to, and have you had it in your possession; and up to what time?

Ans. I have, and had it in my possession to time I sold out to plaintiff.

118. When did it come into your possession, and how?

Ans. I found it among my father's old papers after his death, and it came into my hands as executor of his estate.

119. Are you acquainted with the handwriting of Moses Atwood, and have you seen him write?

Ans. I am, and have seen him write his name.

120. Is the signature of Moses Atwood to this paper the genuine signature of Moses Atwood?

(Objected to, witness not qualified.)

Ans. It is.

121. And is he the same Moses Atwood heretofore spoken of by you as the Moses Atwood who formerly carried on the bitters business in Georgetown?

(Objected to as incompetent.)

Ans. He is.

122. What knowledge have you of the handwriting and signature of said Moses Atwood?

Ans. I have been long familiar with his writing and signature, by having seen him write his name frequently, and have received several letters from him.

123. And are you positive that the signature of Moses Atwood to this paper is his genuine signature?

119 Ans. I am.

124. Are you acquainted with the handwriting of your father, Moses Carter, and what knowledge have you of his handwriting and signature?

Ans. I am and always have been familiar with it, and have often seen him write his name.

125. Is the signature Moses Carter to this paper the genuine signature of your father, Moses Carter?

Ans. It is.

126. State whether or not your father was engaged for some time immediately after the date of this paper, in connection with said Moses Atwood, in putting up and selling said bitters.

(Objected to as immaterial.)

Ans. He bought the bitters of Moses Atwood in barrels at an agreed price, and then bottled them and sold them on certain territory allowed him by Moses Atwood.

127. What kind of bottle and labels did your father then use?

(Same objection.)

Ans. He put them up in the old-fashioned round bottle, as before described as Plaintiff's Exhibit F.

Cross-examination by Mr. CLIFFORD, for defendants:

Int. 1. How long previous to the date of the contract of Jan. 1, 1848, was Moses Atwood, to your knowledge, putting up these bitters in Georgetown?

Ans. To my knowledge, I don't remember much about it previous to Jan. 1, 1848.

2. Do you know that he was preparing and selling these same bitters at the date of that paper?

Ans. From personal knowledge I do not.

3. Do you know that he was at that time preparing any bitters at all?

120 Ans. From personal knowledge I do not.

4. Do you know that he ever at any time put up the bitters now claimed by the plaintiff?

Ans. I do.

5. How do you know that he ever compounded the same medicine now prepared by the plaintiff?

Ans. I have seen him at work preparing, and have known of his delivering the bitters to my father by the barrel, and we put them up in bottles with the yellow labels as before described, and have also worked for him bottling the bitters in bottles and labels as before described; that is, since 1848.

6. When the medicine was sold your father in barrels, and when you bottled the same as you have stated, did you know the ingredients of the medicine?

(Objected to.)

Ans. I did not.

7. Do you now know the ingredients of the medicine prepared by the plaintiff, which he calls Atwood's Vegetable Physical Jaundice Bitters?

(Objected to.)

Ans. I know the formula or recipe as I gave it to them.

8. Do you know the elements which the plaintiff actually uses in preparing the medicine, which he calls Atwood's Vegetable Physical Jaundice Bitters?

(Objected to.)

Ans. I know what they should use if they go according to the formula; I don't know what they actually do use.

9. Neither do you know that the medicine prepared by Moses Atwood and sold to your father in barrels was composed of the same ingredients which you say your father afterwards put up himself, do you?

(Objected to.)

Ans. I do not from personal knowledge.

121 10. Then, so far as the composition of the medicine is concerned, your knowledge reaches only to the composition of what you and your father put up, does it not?

(Objected to.)

Ans. It does not go any further.

11. Did you and your father always put up the medicine under an unvarying formula?

(Objected to as immaterial.)

Ans. We did until the year of my father's death, which was in 1870.

(MEM. OF EXAMINER.—It is agreed that the grounds of objections to questions and answers should be waived, except as to form, till the deposition is read at the trial.)

12. Did you change the formula any after your father's decease?

(Objected to.)

Ans. I did not.

13. Have you yourself always put up or compounded these bitters in the same way and under the same recipe or formula in all particulars?

(Objected to.)

Ans. I have always made them of the same material but not of the same strength.

14. Then you have made changes in the relative proportions of ingredients, have you?

(Objected to.)

Ans. I would say on this particular brand or label I have.

15. And have the bitters thus varied in strength been put up in the same way as to form of bottle, label, color of label, &c.?

(Objected to.)

Ans. They have.

16. How many gross of the weaker bitters have you thus put up and sold, approximately, if you cannot state accurately?

122 (Objected to.)

Ans. It covered a space of five years, I think; perhaps from 150 to 200 gross a year.

17. Was the plaintiff informed of this?

(Objected to.)

Ans. He was not through me or to my knowledge. They did know it before the sale to them.

18. Do you know whether Bateman used the same formula you did or not?

Ans. I do not.

19. I see your label states that Carter's are the only genuine; was not that so advertised to meet Bateman's competing article, and did you or not then think his bitters was a different one from yours?

(Objected to.)

Ans. It was so advertised for that purpose, and I thought his different from ours.

20. Did you think, and do you now, that Bateman's was the genuine Atwood's Bitters?

(Objected to.)

Ans. I do not think they were made according to the original genuine recipe.

21. Was not this preparation of Bateman's in a fluted bottle which had a yellow label, which had the same descriptive and directory words as yours had?

Ans. It always has been as long as I have known the article.

22. Is the contract of date Jan. 1, 1848, the one through which you supposed your father derived his title to this article from Moses Atwood?

(Objected to.)

Ans. It is not.

23. Have you, or have you seen, any other document purporting to grant to your father from Moses Atwood the right to this article, with its bottle, label, and title?

123 Ans. I have seen such a document in connection with Benj. S. Dodge and Carter, Dodge & Co.

24. Do you know where that paper now is?

Ans. There were different papers, I think, from 1852, the last in 1875. The last Mr. Chase has a copy of; the original, I don't know where it is.

25. How many papers do you think there have been executed from Moses Atwood to your father? Any besides the one of Jan. 1, 1848?

Ans. I don't know of any but that.

26. Do you know of any papers giving the right to make this medicine and use the alleged trade-mark as now set up given by Moses Atwood to your father?

Ans. I do not: not to my father alone.

27. Were there any papers or paper giving the right to the preparation of the medicine and to the bottle and label as now set up given by Moses Atwood to Carter & Dodge?

Ans. There were papers given to Carter & Dodge, giving them the right to manufacture the bitters, using Moses Atwood's name. I know nothing about the bottle.

28. Do you know where those papers now are?

Ans. I do not.

29. When did you last see them?

Ans. I cannot tell.

30. Did they ever come into your possession?

Ans. I don't know that they ever did.

31. If they were ever in your hands to whom did you deliver them?

Ans. If they were ever in my hands I delivered them to Eli B. Johnson.

32. How did it happen that you gave them, if you did—that you gave those papers to him; upon what representation of his, or upon what knowledge of your own as to who he was or whom he represented?

(Objected to.)

124 Ans. If I gave them to him I did it because he was the man that I did the most of the business with in making the transfer to the plaintiff. He at that time wished for all the old papers I had as coming from Moses Atwood.

33. Did he say in substance that he was acting for or in behalf of the plaintiff?

(Objected to.)

Ans. He gave me to understand he was acting for the plaintiff.

34. Have you any doubt that you gave that paper or papers to him? Have you seen them since?

(Objected to.)

Ans. I gave him all the papers I had relative to the right coming from Moses Atwood. I have not seen it since.

35. Did that paper or those papers convey anything more to Carter & Dodge than the right to put up the medicine and use Atwood's name?

(Objected to.)

Ans. I don't know that they did.

(MEM. OF EXAMINER.—Defendant gives notice to plaintiff to produce the paper or papers above referred to, the same being a permission from Moses Atwood to Carter & Dodge to put up the medicine described and use Moses Atwood's name.)

36. Do you know if any papers were executed from Moses Atwood to Carter, Dodge & Co. concerning the right to put up this medicine and to use the bottle, label, &c., as now claimed by plaintiff?

Ans. I do know there were such papers granting them the right to put up, manufacture, and sell, using Atwood's name as they saw fit; I don't know about the bottle.

37. Did you ever have those papers?

Ans. I could not say.

38. How do you know there were any such?

125 Ans. Moses Atwood acknowledged that there was, and gave me a sworn statement to that effect, February, 1875.

39. Is that all the knowledge you have of it?

Ans. I have seen the papers before.

40. In whose hands or possession?

Ans. They were in possession of Carter, Dodge & Co., before their suit with Bateman; I can't tell the date.

41. Do you know where the papers are now?

Ans. I do not.

42. Were there any papers giving a right to prepare this medicine, and use the bottle, label, &c., as claimed by plaintiff, from Moses Atwood to M. Carter & Son?

Ans. I don't know that there was.

43. Were there any such from Moses Atwood to M. Carter & Sons or to you?

Ans. I don't know that there was; none to me certainly.

44. Do you know whether Benjamin S. Dodge had any paper from Moses Atwood to said Dodge, giving him, personally, the right to put up the medicine, and use the label and bottle now claimed by the plaintiff?

Ans. I do not know that he did have, personally.

45. Do you not know from Dodge, directly or otherwise, that he did not have any such permit?

Ans. I do not know.

46. Where did B. S. Dodge prepare the medicine, and use the bottle and label, after the dissolution of Carter & Dodge?

Ans. At his place in Rowley.

47. For how many years did or has he thus put up the medicine and used the bottle and label claimed by plaintiff?

Ans. I think from about 1857 or '8 until he sold his right to the Mystic parties and Dorman.

48. Did Dodge use the title, Atwood's Bitters, and Georgetown, Mass., on his labels?

Ans. He did.

126 49. Did he cease to manufacture after the sale to the Mystic parties and to Dorman?

Ans. He did, so far as I know.

50. Did the Mystic parties use the title, Atwood's Bitters, and Georgetown, Mass.?

Ans. They did.

51. Did both Dodge and the Mystic parties have the words Georgetown, Mass., blown in the glass of the bottles?

Ans. They did.

52. Did all the parties whom you have mentioned use a yellow label with the same descriptive and directory words now on the plaintiff's label?

Ans. They did.

53. Do you know how and from whom Brewen & Hobart, of New York, got their right, if any, to put up the medicine and use the label above referred to?

(Objected to.)

Ans. I don't know to my certain knowledge.

54. Have you ever heard?

Ans. I have.

55. From whom was it?

(Objected to.)

Ans. I have heard that their right came from Moses F. Atwood to Daniel French, and from him to Brewen & Hobart.

56. Have you ever seen any of their bottles and labels?

Ans. I have.

57. Do they use a fluted bottle, yellow label, words, Atwood's Bitters, Georgetown, Mass.?

(Objected to.)

Ans. They did not use the fluted bottle. They used a yellow label, not the same label as on the fluted bottle. I think they did use the words, Georgetown, Mass., and Atwood's Bitters.

127 58. Do you know how long they have made and sold these Atwood's Bitters, and whether they are now so doing?

(Objected to.)

Ans. I do not know.

59. What interest did Carter & Dodge own in the right to the medicine and to the use of the label and bottle, as now claimed by plaintiff, at the time of their dissolution?

Ans. I suppose they owned the entire right to the bottle with the lettering blown in the glass, and the label. I don't mean that they claimed the fluted bottle without the letters blown in it.

60. Do you know what right they owned at the time of their dissolution, of your own knowledge, except as shown by said paper of Jan. 1, 1848, to your father?

(Objected to as to' general.)

Ans. They owned all the right in Atwood's Bitters to manufacture and sell them, except what Mr. Atwood reserved.

61. Do you know that they, before their dissolution, owned all but what Atwood reserved, of your own knowledge?

(Objected to.)

Ans. I know I have heard them make the statement that they owned all but what Atwood reserved.

62. Is this, sir, what you have heard them say, the foundation of your knowledge upon this subject?

(Objected to.)

Ans. It is, and with the acknowledgment of Mr. Atwood with regard to it.

63. When did Carter & Dodge dissolve?

Ans. In 1855, when the firm became Carter, Dodge & Co.

64. Were there any writings between the members of the old firm, as to these bitters, label, and bottle, and as to how they should be owned by the new firm?

128 Ans. I don't know that there was.

65. When B. S. Dodge went out to Rowley, was there any writing from the firm granting him any share in the right to the bottle and label and the words Atwood's Bitters, and Georgetown, Mass., the latter being blown in the bottle?

Ans. There was one relating to the territory in which he should sell bitters. I know of nothing more.

66. When the firm became M. Carter & Son, were there any writings passing the right to the bottle, label, and words Atwood's Bitters and Georgetown, Mass., the latter blown in the bottle, to the new firm?

Ans. I don't know that there was.

67. You were a member of that firm, were you not?

Ans. I was not.

68. Were there any writings passing the alleged title to the label,

bottle, words Atwood's Bitters, Georgetown, Mass., the latter blown in the glass of the bottle, to M. Carter & Sons?

(Objected to.)

Ans. There was not.

69. Did the claim of M. Carter & Son to the exclusive right to make the medicine, use the bottle and labels and words as described, embrace New England?

(Objected to.)

Ans. It did, with the exception of some reservations Atwood had previously made.

70. Name the reservations.

(Objected to.)

Ans. There were reservations that Atwood reserved for his brother Levi, also his father.

71. What parts were reserved to these two relatives?

(Objected to.)

Ans. Maine and part of New Hampshire.

72. After Carter, Dodge & Co. were non-suited in their case against Bateman, was the suit ever renewed?

129 Ans. It was not.

73. Did Bateman thereafter continue to put up the bitters, using the bottle, label, and words before referred to?

Ans. He did.

74. How long have the Mystic parties put up the bitters as described and in the manner described?

Ans. From about the time they made the purchase of Dodge till the sale to the plaintiff.

75. How long have you used the label of the character such as is annexed to your 86th direct answer?

Ans. From about 1870 to 1875.

76. Have you, during that time, used any other kind on the bottles of this medicine?

Ans. I have.

77. How many kinds of labels have you during this time used on the bottles of this medicine?

Ans. I have used but the two kinds, one with the heading, and the other the original label.

78. Of which have you used the most since 1870?

Ans. I think the original label.

79. Did you put up and sell the same medicine under both labels, compounded and made in the same way?

Ans. I did, but not in the same strength.

80. Under which label did you put up the medicine made in all particulars according to the original Atwood formula?

(Objected to.)

Ans. The label with the Carter heading.

81. Were the materials of which you made the bitters put up under the original Atwood label as good in every respect as those from which you made the Carter bitters?

(Objected to.)

Ans. It was as far as I know.

82. Did the bitters thus put up sell for as high a price as the Carter bitters?

130 (Objected to.)

Ans. It did not at wholesale.

83. Were or not your Carter bitters well known in the trade as distinguished, for instance, from Bateman's?

Ans. They were.

84. Were or not they so known as distinct from the Mystic bitters?

Ans. They were from the time we commenced using that particular heading, not before. The same in respect to Bateman's.

85. Will you state whether Bateman continued to prepare and sell his bitters with the yellow label, with the words Atwood's Bitters, and the words Georgetown, Mass., after the failure of your father's suit against him?

Ans. He did.

86. Have you ever put up any Atwood's Bitters in a bottle like Exhibit F, yourself?

Ans. I have not.

87. Did M. Carter & Sons use any other kind of bottle than a fluted one, substantially like Exhibit C, for instance, in form?

Ans. They did not.

88. Did Carter, Dodge & Co. ever use any other bottle than one in form substantially like Exhibit C?

Ans. Not to my knowledge.

89. Since the time of the existence the firm of Carter, Dodge & Co., have not Dodge, Bateman, the Mystic people, and yourself used the bottle in form substantially like Exhibit C?

Ans. They have.

90. Who besides Hay and Wood, of Portland, to your knowledge, have used a longer bottle than Exhibit C, and a smooth round bottle? (Objected to.)

131 Ans. I have known of Moses Atwood, my father, and Carter & Dodge using a smooth round bottle and longer than Exhibit C.

91. For how many years has the bottle in form substantially like Exhibit C been in use by Carter, Dodge & Co., M. Carter & Son, and M. Carter & Sons?

Ans. I think since 1852 or '3.

92. And from that time has it not been the only one used for containing these bitters?

Ans. It has.

93. So that from that date, viz, 1852 or '3, the round bottle, like Exhibit F, has been discontinued from use with this medicine by the parties named, has it not?

Ans. It has.

94. Moses Atwood first used the bottle, in form like Exhibit F, did he not?

Ans. I do not know.

95. Do you know when and by whom the bottle in form like Exhibit C was adopted?

Ans. Soon after the copartnership of Carter & Dodge.

96. This was a form got up by them, was it not, for this particular medicine?

Ans. I don't think it was.

97. Was not this form of bottle first adopted by them in connection with this particular bitters?

Ans. It was so far as my knowledge goes.

98. When did you first see the Exhibit F? Did you furnish it to the counsel in this case?

Ans. As long ago as I can remember. I furnished it to the counsel in this case.

99. Do you know where it came from before it fell into your possession?

Ans. It came from among the old stock that came to me from among all the old firms from Carter & Dodge up.

100. How long have you known, if at all, of the use of the bottle like Exhibit B by the defendant?

132 Ans. I have frequently seen them in the market the last few years.

101. For about how many years, as nearly as you can get at it?

Ans. Eight or ten years.

102. What parts of the United States did Moses Atwood reserve to himself, and what does he now hold under said reservation?

(Objected to.)

Ans. He reserved the right to manufacture and sell, I think, west of Illinois; I don't know what he now holds.

103. Do you know whether Moses Atwood himself puts up any of these bitters now, or has within late years?

(Objected to.)

Ans. I know that he puts up what he claims to be an improved medicine, called Atwood's Anti-Bilious Bitters.

104. Do you know whether he has put up the Atwood's Bitters involved in this case?

Ans. I do not.

105. What sort of a bottle, label, and color of label does or did he use with the Atwood's Anti-Bilious Bitters?

(Objected to.)

Ans. The round bottle with a yellow label; smooth, round bottle.

106. Was or is the bottle you speak of like Exhibit B, or F, in shape or size?

(Objected to.)

Ans. It was shorter than either, thick glass, about same size. The bottle he used is what is called a round-shouldered prescription bottle.

107. How long did Moses F. Atwood work with Bateman in all, and at what times?

Ans. I should think two or three years, from 1857 or '8 to 1860 or '61; may have been shorter or longer time.

133 X. 108. Referring to your 35th direct answer, will you state how you know of the arrangement therein referred to? Were you present to hear it made?

Ans. I was present to hear it made, and have also seen a paper and agreement describing the territory.

X. 109. Was it embraced in that arrangement, that each member of the firm could sell rights to the trade-mark and label to others outside the firm?

(Objected to.)

Ans. It was not.

X. 110. Was it in that arrangement that members of the firm could remove to any part of the United States, and there put up the medicine, and use the words, label, &c., on the same?

(Objected to.)

Ans. I think there was no assignment of that kind.

(Objected to.)

X. 111. Were you paid any money for the transfer to the plaintiff for your interest in this alleged trade-mark, &c.?

Ans. I was.

X. 112. Were you paid the amount named in the deed?

(Objected to.)

Ans. I was.

X. 113. What was the price per gross of the bitters in the business, referred to in your 99th direct answer?

(Objected to.)

Ans. The price of the bitters, under the label Exhibit A, was with us, to wholesale dealers, from $15 to $16 per gross.

114. What was the price of the Carter bitters?

(Objected to.)

Ans. To wholesale dealers $27 per gross.

115. Do you know the price of the Bateman, the Dodge, and the Mystic bitters, before the sale to plaintiff, per gross?

(Objected to.)

134 Ans. I know the price wholesale dealers said they bought them at, that is, the Bateman and the Mystic; some $15 or $16 per gross.

116. Do you know that Moses F. Atwood did not know the correct formula of Moses Atwood for making Atwood's Bitters?

(Objected to.)

Ans. I do not.

117. Do you know whether he had a right to sell to others the recipe or not?

(Objected to.)

Ans. I do not.

118. Why was the label attached to your 86th answer employed and used?

Ans. It was used to designate that particular brand, as other makers claimed theirs was the only genuine article.

119. And the genuine article was put up under that label, was it not?

Ans. It was.

120. And the $16 bitters were put up by you under the original Atwood label, were they not?

Ans. They were.

121. Do you think that the bottle and label Exhibit B would deceive a dealer acquainted with the bottle and label Exhibit A into the belief that, when buying B, he was buying A?

Ans. I do not think it would if he was acquainted with the article.

122. You do think, do you not, that a person unacquainted with the article A might be deceived by B?

Ans. I do.

123. Do you think the inexperienced purchaser would be deceived, if he took pains to read the words "Prepared by Nathan Wood, sole proprietor, Portland, Me.," on the label of B?

Ans. I think he would.

135 124. Do you, or not, think that the inexperienced purchaser would be deceived into the belief that he was buying the genuine Atwood's Bitters, such as put up by you, under the label attached to your 86th answer, when a bottle of the $16 bitters, with the original Atwood label on it, was offered him?

(Objected to.)

Ans. I think he would.

125. Referring to your 93d direct answer, have you any of the circulars which you issued as counterblasts to the circular of Bateman, attached to your 91st answer? If so, will you produce samples of them?

Ans. I have none.

126. To what extent did M. Carter & Sons make and sell these bitters per year?

Ans. They sold from 300 to 400 gross per year.

127. How much under the Carter label and how much under the original Atwood label?

Ans. The sale was about equally divided.

128. How was it with M. Carter & Son up to the year before you sold to the plaintiff?

Ans. There was more of the $16 article sold; wholesale dealers like them the best to buy.

129. Do you or not think that an inexperienced purchaser, when buying the Bateman Bitters, might think he was buying the genuine Atwood's Bitters, such as put up under label attached to your 86th answer?

(Objected to.)

Ans. I think if he observed the label closely he would know he was buying Bateman's particular manufacture, as he had his name in red ink printed across the label.

130. And yet you think, referring to your 123d cross-answer, that when the purchaser read on Wood's label the words, "Prepared by Nathan Wood, Portland, Me.," he would be deceived, do you?

136 Ans. I should say if they read "Manufactured by Nathan Wood," they would not be deceived in the manufacture. I think an inexperienced person would be as likely to buy one as the other of the three different kinds.

131. Does or not the original Atwood formula state the proportions in which the ingredients are to be mixed?

(Objected to.)

Ans. It does.

132. Then if you depart from the proportions named, you to that extent disregard the formula, do you not?

(Objected to.)

Ans. If less quantities are used than mentioned in the formula, the article would be weaker.

133. Was that what you did in making the $16 bitters, that is, use less quantities of the medicinal substances?

Ans. The same quantities were used, and it was extended or inflated, that is, the same quantity made a larger amount of the bitters.

134. Do you mean by the word "extended," dilated by a larger proportion of water (or something else) to a given amount of medicinal substances?

(Objected to.)

Ans. I do, by water.

135. Did you have any unvarying standard by which you diluted the $16 bitters, or was some lots stronger than other portions or lots?

(Objected to.)

Ans. We had an unvarying standard.

136. Was there, in the $16 bitters, one-half as much medicinal matter in proportion to the water used as there was in the Carter Bitters, or does the price indicate about the proportion of medicine and water?

(Objected to.)

Ans. There was more than one-half in the cheap bitters. The

137 price was not in proportion to the cost, the $16 bitters costing nearly as much for materials as the Carter. We save one cent for stamp on each bottle.

137. What, if anything, did you pay to your brother for the oral conveyance of which you speak in your 108th direct answer?

Ans. I paid some $3,000 for his part of the stock in the business, the trade-marks, and rights going with it.

138. Was there really any mention of this alleged trade-mark in that oral conveyance of which you speak?

(Objected to.)

Ans. There was no price mentioned for the trade-mark. He sold me all the stock he had in the business with all the rights he had in the business. I can't say there was any mention made of the trade-mark at the time of the purchase.

139. Was there anything mentioned in that oral sale to prohibit your brother from using the alleged trade-mark claimed by the plaintiff?

(Objected to.)

Ans. There was not to my recollection.

140. At whose request or suggestion was the written agreement made, referred to in your 106th direct answer, of date March 1, 1875?

(Objected to.)

Ans. At the request and suggestion of Eli B. Johnson.

141. When was the oral sale made referred to in your 107th direct answer?

Ans. Some three years previous.

142. In that oral sale was there really anything said about the sale of the trade-mark now claimed by the plaintiff?

Ans. It was understood that all his rights and privileges went with the sale. There was nothing said about the trade-mark claimed by the plaintiff.

138 143. Will you explain how you can testify that such a thing was understood by both when there was nothing said about it?

Ans. My brother made the proposition that if I would buy out the stock he would quit the business, and I should have all the rights and privileges in the business.

144. Are you under any agreement with the plaintiff not to disclose the formula of Moses Atwood? If not, will you give it?

(Objected to.)

Ans. I am, and hence decline to disclose it.

145. Have you ever seen any Atwood's Bitters put up in a rectangular bottle, somewhat wider than it is thick, prepared by Bateman, at Georgetown?

Ans. I have, some years ago.

146. How extensive was the sale of that article?

Ans. Very small, to my knowledge.

147. Did the bottle have a yellow label and the words Georgetown, Mass., and Atwood's Vegetable Physical Jaundice Bitters?

Ans. I think it did.

148. For some years previous to your sale to the plaintiff, were not your bitters and those of Bateman and those of the Mystic people distinguished from each other in the trade by the names of Carter's, Bateman's, Mystic?

Ans. I think wholesale buyers generally knew.

149. Did, or not, other dealers also know them by these names?

Ans. I cannot say.

150. Did, or not, parties, dealers, call for the bitters by these names when purchasing, and were there not classes of purchasers who preferred one or the other of these brands?

Ans. They frequently inquired whose manufacture they were. I

think there were classes of purchasers who preferred one or the other of these brands.

139 X. 151. Are not these names still continued by the plaintiff in its trade lists and such advertisements, in order to meet the requirements of the trade, from the reason given in your last reply?

(Objected to.)

Ans. I don't know that they are at the present time.

152. How long previous to the sale to the plaintiff have the Mystic people been making these bitters?

Ans. Some ten years, I think.

153. How long did Dodge put up the bitters at Rowley?

Ans. From the dissolution of the partnership of Dodge, Carter & Co. till he sold to the Mystic party and Dorman.

Redirect by Mr. CHASE:

128. Did you ever see the original Moses Atwood formula for making said bitters; if so, when and where?

Ans. I have; in my father's possession, in the time of the copartnership of Carter & Dodge.

129. In whose handwriting was such formula which you saw in possession of Carter & Dodge?

Ans. Moses Atwood'.

130. Do you know what has become of that particular formula or paper?

Ans. I do not.

131. State whether or not Carter & Dodge, Carter, Dodge & Co., Carter and Son, Carter & Sons, and the second firm of Carter & Son, and you yourself, did or did not all compound said bitters according to the formula which you saw in the possession of Carter & Dodge in the handwriting of Moses Atwood.

Ans. We did, as far as my knowledge goes.

132. Do you or not know that all these parties compounded according to this formula?

140 Ans. I know they all had it to compound from. At times I know they all used this formula, and presume they always did.

133. Was the formula which you saw in Atwood's handwriting the same formula which you delivered to the plaintiff?

Ans. It was. It had been copied on to a book, and I delivered the recipe from the leaves of the book.

134. In your cross-examination you testify in regard to some of the Atwood's Bitters made by you which were slightly weakened; state in what respect they were so weakened.

Ans. With water, in order to meet with the contingenc'es of the times.

135. To what ingredient or ingredients in the composition of the medicine did you add a larger proportion of water?

Ans. It was added to the whole formula.

136. Was or was not the bitters so weakened precisely the same as those not weakened, except as to the quantity of water?

Ans. They were.

137. Then for the weakened bitters to produce the same effect as the other it was only necessary to increase the dose?

(Objected to.)

Ans. That is all.

138. And is this all you mean by change of formula?

Ans. It is.

139. Did you ever see the formula according to which Bateman made his bitters?

Ans. No.

140. Have you any actual knowledge from Bateman or any other source what Bateman's formula actually was?

(Objected to.)

Ans. I have not.

141 141. When did you last see the paper referred to by you in your cross-examination as the paper or agreement by which Moses Atwood conveyed to Carter & Dodge, or Carter, Dodge & Co., his entire interest in his bitters business, except his right to sell them beyond Illinois?

Ans. I have not seen it since about the time Carter, Dodge & Co. brought the suit against Bateman.

142. Have you made a search for said paper; and if so, how and where?

Ans. I have made diligent search among my father's old papers, in the winter of 1874–'5.

143. Have you made enquiries for it?

Ans. I have.

144. Have you made a careful and diligent search for the paper where it might be expected to be found?

Ans. I have.

145. And have you, after such careful and diligent search, been unable to find such paper or get information of its whereabouts?

Ans. I have.

146. State, as nearly as you can, the date of this paper.

(Objected to.)

Ans. Some time in 1855.

147. From whom to whom was the paper executed?

(Objected to.)

Ans. From Moses Atwood to Carter, Dodge & Co.

148. By whom was it signed?

(Objected to.)

Ans. By Moses Atwood.

149. State the contents of it, as nearly as you can?

(Objected to.)

Ans. It gave them all the rights and privileges in the business, to manufacture and sell the medicine, and to use the Moses Atwood's name, and there was also a power of attorney from Moses At-

142 wood to them. By the medicine I [mean] the Atwood's medicines. There were different kinds, to wit: Atwood's Vegetable Physical Jaundice Bitters, Atwood's Dysentery Drops, Atwood's Canker Drops, Atwood's Liniment, Atwood's Strengthening Plaster.

150. Were these several medicines first prepared and sold by said Moses Atwood, and were they called Atwood's medicines because first prepared and sold by him?

Ans. They were.

151. And did Carter & Dodge, Carter, Dodge & Co. also obtain from said Moses Atwood recipes for making all these several kinds of medicines?

Ans. They did.

152. State whether or not said Carter & Dodge and Carter, Dodge & Co. and their successors put up and sold, under such purchase, these several kinds of said Atwood's medicines, under their respective trademarks.

Ans. They did.

153. How long did they continue to so put up and sell said several kinds of Atwood's medicines?

Ans. Up to the time that they severally sold themselves out of the business.

154. Do you mean that they put up and sold these several kinds as long as they did the bitters?

Ans. They did. I never knew that the Mystic firm put [up] any of said Atwood's medicines except the bitters. I think Bateman at times put up the other articles.

155. In your answer to the 38th cross-interrogatory you speak of Moses Atwood's affidavit, in which he states the fact of his sale to Carter, Dodge & Co. of all his rights in the Atwood Bitters; can you state the date of such affidavit?

Ans. It was February, 1875.

156. Does the paper now shown you refresh your recollection as to the date of such affidavit?

Ans. It does.

143 157. Then state the date.

Ans. Feb. 14, 1875.

158. And is this paper now shown you a copy of said affidavit?

(Objected to.)

Ans. It is.

159. To whom did you deliver the original affidavit?

Ans. To Eli B. Johnson.

160. Have you been informed that said original affidavit was used on the hearing of the injunction motion in this suit, and that the same is on file in the clerk's office at Portland?

(Objected to.)

Ans. I have been so informed by Mr. Chase?

161. Who obtained said affidavit from said Moses Atwood?

Ans. I did.

162. For what purpose?

(Objected to.)

Ans. For myself—as some papers had been lost or mislaid—to show that I had a clear title from Mr. Atwood, and that he recognized it as such.

164. Describe the bottle and label used by Brewer & Hobart, referred to in your answer to the 55th X-int.

Ans. It was a flat bottle with a yellow label. The label read, Atwood's Jaundice and Dyspeptic Bitters, or Atwood's Dyspeptic and Jaundice Bitters, or some such way.

164. Was it the regular Atwood label, as on Exhibit A?

(Objected to.)

Ans. It was not.

165. Did you ever admit the right of Brewer & Hobart to put up said Atwood's Bitters.

(Objected to.)

Ans. I did not.

144 166. Did you, or not, admit the right of Brewer & Hobart to use the name or any of the trade-marks pertaining to said bitters, as used by Moses Atwood and Carter & Dodge and successors?

(Objected to.)

Ans. I did not.

167. Did you ever admit or in any manner recognize the right of Moses Atwood to sell to Brewer & Hobart or French, or any other per-

son, any rights or privileges pertaining to said bitters or their trade-marks?

(Objected to.)

Ans. I did not, in any way, shape or manner.

168. If, as you state, you heard several years ago that Nathan Wood, the defendant, was putting up a bitters such as Exhibit B, why did you not sue him for doing it at the time?

(Objected to.)

Ans. Because the old firms had not been successful from stopping Bateman from using the trade-mark, and as Wood did not interfere with our trade very much, and because there was no union among the owners that there was nothing done about it.

169. Was or not the matter often spoken of—that is, the stopping of Wood—as a thing which the several joint owners of the trade-marks might do?

(Objected to.)

Ans. It was spoken of and talked over somewhat.

170. By the latter part of your answer to the 168th direct, do you mean that there was a lack of cordial co-operation between the several rightful owners of the trade-marks on account of their divided interests.

(Objected to.)

Ans. I do.

171. Was there or not more or less competition between the several successors of Carter, Dodge & Co. in securing customers for the bitters put up by each.

145 Ans. There was.

172. Did or not this competition between the several successors of Carter, Dodge & Co., tend to prevent a cordial co-operation in protecting their joint property in trade-marks?

(Objected to.)

Ans. It certainly did.

173. Do you know what became of the Carter, Dodge & Co. dissolution agreement?

Ans. I do not.

174. Have you made a careful and diligent search and enquiry for this agreement?

Ans. I have.

175. When, where, and how have you made such search and inquiry?

Ans. Something over a year ago, among my father's papers, also enquiries of Mr. Dodge.

176. After such examination and enquiry, have you been able to find said paper, or ascertain anything as to its existence?

Ans. I have not.

177. Is the paper in your opinion lost or destroyed?

(Objected to.)

Ans. I think it is.

178. State whether or not the several successors of Carter, Dodge & Co. always recognized such an agreement, and acted under it in reference to said bitters business.

(Objected to.)

Ans. They always recognized the right of each party to manufacture and use the trade-mark. There was some agreement in the division of the territory which was disregarded after a time.

179. Was there ever any dispute or difference of opinion be-

146 tween the several successors of Carter, Dodge & Co., as to their joint, mutual, exclusive right to said trade-marks?

(Objected to.)

Ans. There was not.

180. Did said successors always respect each other's mutual, exclusive, joint rights to the trade-marks?

(Objected to.)

Ans. They did.

181. State whether or not the patent medicine trade generally respected the exclusive rights of said successors to said trade-marks?

(Objected to.)

Ans. They did, so far as I know.

182. In your answer to the 71st cross, you refer to a reservation as to Maine and a part of New Hampshire. Explain what you mean by such reservation?

Ans. The reservation was, that we were not to canvass or sell on this territory, as Mr. Atwood had already given it to his brother and father.

183. What name or names was Levi Atwood or Levi F. Atwood, the father and son, to use on any bitters sold by them?

(Objected to.)

Ans. To use their own names.

184. And did they or not, said Levi and Levi F., distinguish the medicine sold by them as Levi Atwood's, or L. F. Atwood's?

(Objected to.)

Ans. They did.

185. In your answer to the 77th X, you say you used two kinds of labels; do you mean by such two kinds the regular label on Exhibit A and the label attached hereto, after your answer to the 86th direct?

Ans. I do.

186. Did you use any other kinds of labels except these two?

147 Ans. I did not.

187. How are the bitters sold by H. H. Hay, at Portland, designated?

Ans. As L. F. Atwood's Bitters.

188. In your answer to the 145th X, you refer to a rectangular bottle and the label?

Ans. A flat bottle holding six or eight ounces, with a yellow label. I mean the Bateman bottle.

Cross resumed by Mr. CLIFFORD:

154. Did the paper referred to in your 141st and 149th re-direct convey, according to your recollection, anything more than stated in the 149th answer?

Ans. I don't know as it did.

155. Then it was a permission, was it not, to put up the various medicines named, and use Moses Atwood's name on them?

Ans. It was.

156. Why did you obtain the affidavit of Moses Atwood referred to in your 159th redirect? At whose suggestion?

Ans. It was at my own suggestion.

157. How long have Brewen & Hobart put up their Atwood's Bitters, to your knowledge, as stated in your 163d redirect?

Ans. I should think some ten years or more; think there was a different style of firm at first.

158. What is and was the color of their label?

Ans. Yellow.

159. Was ever any attempt made to enjoin, by suit, any of the following persons, to wit: Bateman, Wood, Brewen & Hobart, or Hay, except the unsuccessful suit against Bateman, in Essex County, by any of the Georgetown people, to your knowledge?

Ans. There was not.

148 X. 160. Did you ever have an intention or determination so to do?

Ans. I did not.

X. 161. How many years did the absence of cordial relations referred to in your 170th answer exist?

Ans. It commenced soon after the dissolution of Carter, Dodge & Co., about 1958; there was no union after that.

X. 162. Did you ever hear any of the Georgetown people who put up said bitters, ever express a determination to sue and stop the parties named in the 159 X?

Ans. I have heard them talk in regard to it, but not to express a determination.

163. Since 1858, have not the different persons putting up these bitters disregarded each other's rights, if any, as to territorial limits?

Ans. They have.

X. 164. Then each and all have sold where they could or pleased, have they not?

Ans. They have.

X. 165. And these several parties have had no business interests in common, did they, but were in competition with each other, as stated in your 171st redirect?

(Objected to.)

Ans. They were not connected, and were in competition with each other.

X. 166. They were different firms, carrying on different business at different places, were they not?

Ans. They were.

167. And this continued for a period of years before the sale to the plaintiff, did it not?

Ans. It did.

168. Do you know, of your own knowledge, a written document of dissolution such as referred in your 173d X?

Ans. I do.

149 X. 169. During the time in which the several parties named as disregarding each other's territorial rights were so doing, was there any assertion of right by any one of them over any other for such violation?

(Objected to.)

Ans. There was at the first part of it.

170. Was there any legal action taken except the Bateman suit, and was there any assertion of claim after the first, as you say, of any one to exclude any other from any territory, or did they all sell where they wished?

(Objected to.)

Ans. There was no legal action taken. They all sold wherever they could, without regard to each other, that is, after a short time.

171. How many years do you estimate that it was the fact that no such claim of right was made by any one of these against any other?

Ans. I should think since from about 1860 or 1861.

172. How could these parties claim that there were any exclusive rights in any of them, when each was thus transgressing the rights of all the others.

Ans. There was a mutual understanding and agreement to start with, but it was violated and went on in discord.

173. Have you ever heard all of these parties whom you name as thus putting up and selling the bitters, claim that they had an exclusive right to use with these bitters the fluted bottle with Georgetown, Mass., blown in the glass, the words Atwood's Bitters, the yellow label, as against all others but themselves?

Ans. I have, except Bateman.

174. Was there not a time while these different parties were transgressing each other's territorial rights, that no exclusive claims were maintained by them?

Ans. There was not to my knowledge. They all claimed the exclusive right to use the bottle and label as described, and Atwood's name.

150 175. Did or not the Mystic people sell on territory which you considered reserved to you?

(Objected to.)

Ans. They did.

176. Did or not you sell on their limits?

(Objected to.)

Ans. I don't know that we did.

177. Did any of you sell in Maine or New Hampshire, by agents or otherwise?

(Objected to.)

Ans. I think we did the last years.

178. Was there any business connection between the Mystic firm, Norman, Bateman & Dodge, when out at Rowley, and you, or between any of them?

Ans. None to my knowledge.

179. During the eight or ten years while the parties named were thus violating each other's alleged rights, would they have made any effort to prevent anybody from putting up the bitters that had a mind to go into it?

(Objected to.)

Ans. I don't think they would.

180. Did your manufacture of the watered bitters grow out of the competition of which you speak, among these various parties?

[The original contains no answer to int. 180—A. H. D., clerk.]

181. How do you feel able to say that the patent medicine trade respected the rights of the alleged owners of this alleged trade-mark, as in your 181st X? Were there not violations of those rights going on?

Ans. I think if they had not generally respected the trade-marks that they would have gone into the business of putting up Atwood's Bitters themselves, if there was any profit in it.

151 182. But I understand you to have said that, owing to the competition, the business was not profitable; am I right?

Ans. It was not what I considered a very profitable business.

183. And was it not this want of harmony between the various parties and their competition, that destroyed the profits of the business?

Ans. It was.

Direct resumed by Mr. CHASE:

189. By your answer to 165th X int. do you mean anything more than

that the several successors of Carter, Dodge, & Co. were not connected together in the business of putting up and selling the bitters.

Ans. I do not.

190. Did, or not, each of said successors put up and sell the medicine by himself, under a common and joint right to the trade-mark derived from Moses Atwood, through said Carter & Dodge?

(Objected to.)

Ans. They did. There was no dispute about that.

191. Did, or not, said parties observe the terms of the understanding and agreement upon the dissolution of Carter, Dodge & Co., to use the trade-marks in common, that is, for each party by himself, to put up and sell said medicine, all using said Atwood's trade-marks?

(Objected to)

Ans. They did.

192. Was the non-observance of the stipulation as to the territorial division acquiesced in by all the several parties after a little while?

Ans. There was nothing said about it after a few years.

193. And did this have any effect upon their mutual and joint enjoyment and use of the common trade-mark described?

(Objected to.)

152 Ans. It did not.

Cross resumed by Mr. CLIFFORD:

194. Was Bateman ever included in this territorial division of the right to the trade-mark of which you speak, and was he ever recognized as having a share in the right at all?

Ans. He never was so recognized.

LUTHER F. CARTER.

Deposition of Benjamin S. Dodge.

Examination of BENJAMIN S. DODGE, by Mr. CHASE:

1. State your age, residence, and occupation.

Ans. Age forty-eight; residence, Rowley; occupation, farmer.

2. Are you acquainted with the article of medicine in question in this suit, called Atwood's Vegetable Physical Jaundice Bitters; if so, how long have you been acquainted with it?

Ans. I am, and have been about thirty years.

3. Who was putting it up and selling it, when you first knew it?

Ans. Moses Atwood.

4. At what place?

Ans. Georgetown.

5. Had you ever known or heard of the medicine until it was put up and sold by said Moses Atwood, as you have stated?

Ans. I never had.

6. Where were you then living?

Ans. At Rowley.

153 7. How far from Atwood's place where he put up the medicine?

Ans. Two and one-half miles.

8. Are you the Benjamin S. Dodge who was a partner in the firm of Carter & Dodge, and also in the firm of Carter, Dodge & Co., referred to by the witness, Luther F. Carter?

Ans. I am.

10. When did you become a member of the firm of Carter & Dodge?

Ans. In 1852.

11. Who was your partner in the firm of Carter & Dodge?
Ans. Moses Carter.
12. Is the paper now shown you the articles of copartnership between you and said Moses Carter?
Ans. It is; and was executed and delivered when it purports to be.
(MEM.—The plaintiff puts in evidence, under the foregoing stipulation, the above articles of copartnership between Benj. S. Dodge and Moses Carter, dated Feb. 2, 1852.)
13. I notice in this paper some erasures and interlineations. Explain how they occurred.
Ans. When Charles L. Carter came in, we thought it would be just as well to insert his name into the old articles, and we erased and interlined for that purpose.
14. Was this your first connection with the Atwood medicine business?
Ans. It was.
15. Had Moses Carter, your partner, been previously engaged in the Atwood Bitters business?
Ans. He had.
16. And was he so engaged at the time of this partnership?
Ans. He was.
154 17. How long did the firm of Carter & Dodge continue?
Ans. About three years.
18. What did the firm then become?
Ans. Carter, Dodge & Co.
19. Who composed the firm of Carter, Dodge & Co.?
Ans. Moses Carter, C. L. Carter, and myself.
20. Is the paper now shown you the articles of copartnership of Carter, Dodge & Co.?
Ans. It is.
21. Was this paper executed and delivered as it purports?
Ans. It was.
(MEM.—Plaintiff puts in evidence, under the foregoing stipulation, the above articles of copartnership of Moses Carter, Benjamin S. Dodge & Charles L. Carter, dated March 2, 1855.)
22. How long did the partnership of Carter, Dodge & Co. last?
Ans. About three years.
23. What business was carried on by Carter & Dodge, and Carter, Dodge & Co. during the terms of their existence?
Ans. Manufacturing and bottling medicine and essences.
24. What medicines did they make and sell?
Ans. Atwood's.
25. Specify the kinds as far as you now recollect.
Ans. Atwood's Vegetable Physical Jaundice Bitters, Atwood's Extract of Sarsaparilla and Comfrey, Dysentery Drops, Canker Drops, and Spinal Elixir.
26. Under what rights and authority did you make and sell Atwood's medicines above stated?
Ans. We had the right from Moses Atwood.
27. Had Moses Atwood previously made and sold all these articles?
Ans. He had.
155 28. State who claimed to have originated these several medicines.
Ans. Moses Atwood.
29. When did Carter & Dodge obtain this right from Moses Atwood?

Ans. At the time of formation of the firm of Carter & Dodge, in 1852.

30. Without referring to the other Atwood medicines, I call your attention particularly to Atwood's Bitters, the article in suit. Did or not said Moses Atwood, at the time of the arrangements of Carter & Dodge with him to make and sell said Atwood's Bitters, claim to be the sole proprietor and owner of the entire business of making and selling said bitters?

Ans. He did.

31. Is the paper now shown you a paper relating to your said arrangement with Moses Atwood?

Ans. It is.

32. Was the paper executed, acknowledged, and delivered as it purports?

Ans. It was.

(MEM.—Plaintiff puts in evidence, under the foregoing stipulation, the last above-mentioned paper.)

33. Was there, or not, another paper executed and delivered between said Moses Atwood and said Carter & Dodge, or said Carter, Dodge & Co., at or about the time of the formation of the partnership of Carter, Dodge & Co. relating to said bitters?

Ans. There was.

34. When did you know of the existence of the paper last referred to?

Ans. The last I knew of it Moses Carter had it. He had it when it was first made out, and I have not known anything of it since.

156 35. From whom and to whom was this last paper executed?

Ans. It was from Moses Atwood, but whether to Carter & Dodge or Carter, Dodge & Co. I can't state. It was to one or the other.

36. State, according to your best recollection, the contents of this last paper.

(Objected to.)

Ans. It gave us all his, Moses Atwood's, right, title, and interest in the business of said Atwood's medicines.

37. State whether or not the paper specified the several kinds of Atwood's medicines, as you have above stated.

(Objected to.)

Ans. I think it did.

38. State whether or not said paper included your rights to use said Moses Atwood's name and label on the bitters.

(Objected to.)

Ans. It did.

39. What kind of a bottle did Carter & Dodge use for the bitters?

Ans. We commenced with a round, smooth bottle, such as Exhibit F, which is one of the original bottles and labels.

40. Was this bottle and label F the bottle and label used by said Moses Atwood previous to his transfer to Carter & Dodge?

Ans. It was.

41. How long did Carter & Dodge use bottle and label, Exhibit F?

Ans. I think about three years.

42. When was bottle and label Exhibit A adopted?

Ans. About 1855.

43. By whom?

Ans. Carter & Dodge, I think.

44. Did Carter & Dodge procure the mould to be made for the bottle Exhibit A?

157 Ans. We did.

45. Thereafter did Carter & Dodge and Carter, Dodge & Co., Ans. We did.
use the bottle and label of which Exhibit A are fac similes.

46. Did Carter and Dodge and Carter, Dodge & Co., during all the time of their existence, use only the two bottles with their respective labels, Exhibits A and F?

Ans. They did.

47. How did Carter & Dodge obtain their recipe for making the bitters?

Ans. They bought it of Moses Atwood.

48. Was there any agreement at the dissolution of the firm of Carter Dodge & Co. in respect to said business thereafter?

Ans. There was.

49. Was that agreement in writing?

Ans. It was.

50. When did you last see it or know of its existence?

Ans. About the time it was made out. It went into possession of of Moses Carter.

51. Who were the parties to this agreement?

(Objected to.)

Ans. Moses Carter, Benj. S. Dodge, and C. L. Carter.

52. State, according to your best recollection, the contents of this last paper.

(Objected to.)

Ans. Each party should manufacture, bottle, and sell on their ground or territory.

53. Did or not the agreement include the right of the several parties to use the same trade-marks as theretofore used by the firm?

(Objected to.)

Ans. It did.

158 54. What, if anything, according to your best recollections, did the agreement say about the use of the trade-marks by the several parties in common?

(Objected to.)

Ans. Each party to use the mould and label the same.

55. What is the paper now shown you?

Ans. It is one of Carter & Dodge's old circulars which I annex. (The plaintiff puts the same in evidence.)

ATWOOD'S VEGETABLE MEDICINES.

If you would enjoy sound health, cleanse the stomach from bile, purify the blood, keep the bowels regular, breathe pure air, keep the feet warm.

The proprietors of these medicines would respectfully state to the public that the demand for them has been increasing for years, and an earnest desire has been expressed by many who have been restored to health by them that their virtues may be preserved for the benefit of future generations.

They are determined never to reduce them from their present high character and position by curtailing the cost of manufacture. No pains or cost within the bounds of reason, shall be spared to continue them in their pre-eminently humane course of relieving and restoring to health and usefulness the sick and suffering millions of our race.

These medicines are prepared with great care and expressly for family use, and are so well calculated to preserve health and remove disease that no family should ever be without them.

CARTER & DODGE,
Wholesale Dealers, Georgetown, Mass.

☞ To whom all orders must be addressed.

159 VEGETABLE JAUNDICE BITTERS.

Unequaled for the cure of dyspepsia, jaundice, headache, liver complaint, dizziness, worms, colds, loss of appetite, general debility, costiveness, fever and ague, and such other ailments as arise from foulness and debility of the stomach and impurity of the blood.

This medicine, by its constant use for a number of years, has been thoroughly proved, and invariably found to be superior to any preparation ever offered for similar purposes. It has been tried by thousands of the afflicted in different sections of the country, and in nearly every case met with approval. It is unsurpassed for strengthening and invigorating the system; in a word, it may with truth be called the grand health-restorer and nature's truest friend. It is composed of the purest and best extracts of vegetable substances, scientifically combined, celebrated for their tonic, alterative, healing, and strengthening properties, the product of the hill-sides and valleys. Acting as it does upon the stomach, liver and bowels, by removing all the morbid secretions, thereby purifying the blood and invigorating the digestive organs, it not only cures diseases that already exist, but also fortifies the system against all attacks of disease. Thus it is a great preventive of chills, fevers, &c.

It has also become greatly celebrated of late for its remarkable success in some most obstinate cases of fever and ague. For this complaint it should be taken in doses of a table-spoonful to half a wine-glass, morning and evening. It is an infallible cure for sick headaches and severe colds; and if taken in doses of a table-spoonful to half a wine-glass it never fails of effecting a speedy relief. Hundreds of persons who have been afflicted with the dyspepsia for years have been effectually cured by this medicine, and all dyspeptic persons can be cured who will use these bitters as directed, if within the power of
160 medicine. A thorough trial will prove all the above, and being recommended by physicians and others of high standing, all can recomend their use with the utmost confidence.

COMPOUND CONCENTRATED EXTRACT OF SARSAPARILLA AND COMFREY,

With a combination of other valuable vegetables. A most valuable tonic and diuretic for the following diseases: Dyspepsia, indigestion, weakness and sour-stomach, dropsy, stranguary, and all derangements of the urinary organs, which cause the most extreme suffering. Cases of this kind of the most obstinate nature have been relieved in a few hours after all others failed. It is also a most certain remedy to salt rheum, scrofula, and all eruptions of the skin, and the complicated diseases of females, which so often terminate in consumption.

N. B.—Keep the bowels regular with the Jaundice Bitters or Extract of Dandelion in all cases while using a tonic or strenthening medicine to prevent tightness or pains in the chest or head.

DYSENTERY DROPS

Cures in every case the dysentery and diarrhœa if taken in the first stages of the disease, and is a most certain remedy for cramps and pain in the stomach and bowels. It is safe in all cases. The manufacturer would state to the public that the dysentery Drops Dave given universal satisfaction throughout the Union wherever it has been used; and hundreds of people in Massachusetts and vicinity are tendering their most hearty thanks for the benefit they have derived from the use of this most valuable medicine.

161 CANKER DROPS.

A sure cure for canker if taken in season, and perfectly safe if used according to directions.

STRENGTHENING PLASTERS.

Warranted to be an effectual cure for pains in the side, hips, and stomach, female weakness, affections of the spine, nervous affections, diarrhœa, rheumatism, sprains, and fresh wounds.

RHEUMATIC OR SPRAIN LINIMENT.

An effectual cure for rheumatism, weak or swollen joints, sprains, bruises, burns, pain in the side, back, shoulders, and limbs, and all fresh wounds. It is also good in all cases of palsy, sciatic neuralgia, cramp, gout, weakness across the kidneys, chilblains, or cold or burning of the feet. It causes the blood to circulate naturally, and is one of the most strengthening and healing medicines now in use, and never fails of giving satisfaction.

COMPOUND EXTRACT OF DANDELION

Is composed of dandelion and many other valuable plants. It never fails of giving relief in all cases of excess or deficiency of bile. It promotes the healthy secretion of the stomach, liver, and intestines, removing all bilious accumulations of matter. It is efficacious in dyspepsia or indigestion, flatulency, costiveness, palpitation, bronchitis, inflammation in the stomach and bowels, piles, febrile diseases, pain in the head, side, stomach, or determination of blood to the head. It acts on the urinary organs in a wonderful manner, in subduing inflammation, suppression of the urine, affections of the kidneys, female complaints, dropsy, stranguary, and gravel.

162 N. B.—It is physical, and can be taken in small quantity to serve as a laxative, or in larger doses to operate smartly as physic, as the nature of the case may require. It is safe in all cases.

For the above diseases, take sufficient to keep the bowels regular at all times, and occasionally larger doses to produce a thorough operation as physic.

TESTIMONIALS.

The following are a few of the many testimonials offered of the benefits received of their use:

TO THE PUBLIC.—It cannot be successfully denied that many certificates of wonderful cures are unceasingly poured upon the public by

designing and unprincipled men for the mean purpose solely and exclusively of "putting money in their purses," without the most distant expectation of alleviating the pains or dissipating the torments of the suffering invalid.

Notwithstanding such villainous practices, there are those medicinal remedies which seem, as it were, ordered of Heaven to assuage and heal "the ills that flesh is heir to," calculated to restore to usefulness the sinking sufferer, and to change a life of cruel pains and physical trial to comparative comfort and ease. Of this character are the Jaundice Bitters, prepared by Mr. Atwood, of Georgetown, Mass. I speak from experience, and would not for the world exaggerate or misrepresent the matter. I have suffered much from pains in the head and stomach, from colds and coughs, and will truly and sincerely say that Atwood's medicines invariably relieved and restored me, and I would respectfully and earnestly recommend said medicine as the most efficacious and certain remedy for those complaints to which the human
163 system is at all times exposed. It is calculated expressly for a successful general family medicine, and as such I trust my fellow-citizens will cordially receive it, and so encourage the manufacturer to continue to pour upon the world, in a never-failing stream, his ever-sure and successful health-restoring medicine.

WM. F. CONANT,
Ipswich, Mass.

Mr. ATWOOD:

SIR: Having for years been afflicted with dyspepsia in its worst forms, and finding no relief, but an increase of suffering, from medicines prescribed by practitioners, I had concluded that I must remain its victim through life. But I am happy to say that six bottles of your Jaundice and Dyspeptic Bitters have effected a complete cure, and I do not hesitate to pronounce it superior to any dyspeptic preparation that is now in use.

CATHERINE WAMSER.

MERRICK, L. I., *Dec. 5th*, 1851.

Mr. ATWOOD:

SIR: I take great pleasure in informing you that I have used your Jaundice and Dyspeptic Bitters for severe attacks of the sick headache, and have experienced the most beneficial results from them. I had for years been afflicted with the sick headache, at times unfitting me for any business whatever. I was induced to try your bitters, and I found that they gave me almost immediate relief.

Yours truly,

PHILIP D. WELLER.

NEW VILLAGE, N. J., *Nov.* 14, 1851.

Mr. ATWOOD:

SIR: Having a child that had for several years been subject to fits, after trying many medicines to no avail, being advised to try your bitters, whenever symptoms of fits were manifest, which, to our great joy, have thus far prevented her from having any since, we have used the bitters for colds and bilious complaints generally, which
164 have given entire satisfaction. We have also used the Rheumatic or Spinal Elixir, Canker Drops, and Strengthening Plaster, and find them all that they are recommended to be; and will further state

that, after trying medicines prescribed by a regular physician, we were advised to make use of your Dysentery Drops, which gave immediate relief, and in a few days effected a perfect cure.

THOMAS MORSE.
MARY R. MORSE.

GEORGETOWN, MASS.

Mr. ATWOOD:

SIR: This is to certify that I have used one bottle of your Compound Extract of Dandelion, after being in a decline of health for six months, and have received great benefit from its use, and would most cheerfully recommend it to the public in general who are afflicted with disease, and believe it to be what is recommended.

CHARLES F. HOWE.

LOWELL, *Oct.* 8, 1852.

This may certify that I have for several years past used Atwood's Jaundice Bitters and Strengthening Plasters, and have of late made use of his Compound Extract of Dandelion, and have received great benefit from the use of them.

JONATHAN KIMBALL, JR.

BRADFORD, MASS., *March* 25, 1852.

Mr. ATWOOD:

SIR: For two years past I have made use of your Compound Extract of Dandelion in my family, and in several instances it has restored my mother to health after trying other remedies to no avail, and I have in all cases found it to be one of the most valuable medicines that I ever used and I could not willingly do without it, and would highly recommend it to others.

EUNICE G. MERRILL.

GEORGETOWN, MASS., *Dec.*, 1852.

165 The following letter is from the coroner of Bucks County, Pa., a gentleman of high standing and the strictest integrity:

Mr. ATWOOD:

DEAR SIR: Having been afflicted with dyspepsia in its most virulent form for several years, and after trying different kinds of medicine without experiencing any relief, I was induced by the persuasion of a few friends to try your Jaundice Bitters. I was beneficially affected after taking one bottle, and by the time I had taken three bottles I was so far restored to health as to surprise my most sanguine friends. A few bottles more completed the restoration of my health, and I can now, from my own experience, with the fullest confidence in its merits, cheerfully recommend it to those who are afflicted with the curse of the physical frame—dyspepsia.

JOHN G. HIBBS.

NEWPORTVILLE, *October* 28, 1851.

The undersigned, manager of the Bergen Iron Works, Ocean Co., N. J., takes pleasure in stating that he has been acquainted with Atwood's Jaundice and Dyspeptic Bitters for the last three years; during which time it has been used extensively and uniformly by residents of the place and vicinity; and he believes the medicine one of the best com-

pounds now before the public for what it is designed. Its popularity has steadily increased since its introduction here, and its reputation has become so well established that it is used by almost every family in this section.

BENJ. SNYDER.

JULY 29, 1852.

Certificate of Dr. C. R. Pomeroy.

To all whom it may concern:

166 This it to certify that I have used in my practice for many years Atwood's Jaundice and Dyspeptic Bitters, and I find them to fulfill all the indications for which they are used.

C. R. POMEROY.

MULLICAHILL, N. J., *February* 7, 1852.

Mr. ATWOOD: This is to certify that I have sold quite a number of bottles of your Compound Extract of Dandelion to my boarders, and they all testify to the benefit they have received from its use.

SARAH B. HOWE.

LOWELL, MASS., *Oct.* 11, 1852.

This is to certify that I have used Atwood's Compound Physical Extract of Dandelion, and can highly recommend it as a safe and most valuable medicine in cases of weakness and general debility.

MARIA LAMSON.

No. 8, Lawrence Corporation, LOWELL, MASS.

This is to certify that I have used your Jaundice and Dyspeptic Bitters for fever and ague, and I feel grateful in stating to you that they had a most salutary effect. As I had used them for dyspeptic complaints with good success, and having heard them highly recommended for the chills, I concluded to give them a trial, and I have never regretted so doing, for in a short time I found myself completely cured of the ague, and I would most cheerfully recommend them to the public for that disease.

BENJ. VALENTINE.

FLASHING ALLEY, L. I., *Dec.* 2, 1851.

Mr. ATWOOD:

SIR: This certifies that I took cold about the middle of February, and constant additions to it, became very much reduced in health,

167 and continued so till the first of April, when my side became very lame, and I was unable to sit in my chair only for a short time, and found no relief, until I took your Jaundice Bitters, which gave me immediate relief.

HENRY JORDAN.

BETHEL, *June* 11, 1846.

This is to certify that I have used Atwood's Dysentery Drops for myself and family. My child was afflicted with the bowel complaint for more than six months, and, by using one bottle and a half, a complete cure was effected. They have helped me of the same complaint. I

therefore know that it surpasses all other medicines I have ever used, and I would freely recommend them to the public.

WILLIAM FROST.

GEORGETOWN, *Aug.* 8, 1846.

This may certify that I have used Atwood's Dysentery Drops for the complaint for which they are recommended, and have found them to have given relief to myself and family, and would freely recommend it to the public.

THADDEUS RICHARDSON.

DRACUT, MASS., *Oct.* 24, 1845.

Mr. ATWOOD :

SIR: I hereby certify that I have used your Extract of Dandelion for two years past, whenever my health has failed me, and it never failed of giving immediate relief. When I began to use it, I had continually a faint sinking distress at the stomach, and my flesh and strength were very much reduced, and I had a great heat and inflammation about me, and was daily growing weaker, after trying other medicines without receiving any benefit. The first dose of your Compound Extract of Dandelion gave me such immediate relief that I was encouraged to continue
168 its use, which in a short time restored me to usual health. I have since known several others to use it with the same good effect, and for the relief of the afflicted I would recommend it as a safe and valuable medicine.

HARRIET ILSLEY.

GEORGETOWN, *September*, 1852.

The proprietor of these medicines being aware that there are articles in the market in the shape of medicines that are valueless to all concerned—except the manufacturers and venders—and many poor suffering invalids have not only been robbed of their money, but have thereby lost confidence in the advertisements of the day,

All persons being afflicted with any diseases for which these medicines are recommended are requested, on using a bottle without obtaining relief, to return the bottle and have their money refunded.

CARTER & DODGE.

56. How long after the dissolution of Carter, Dodge & Co. did you continue to make Atwood's Bitters?

Ans. About five years.

57. What bottle and label did you use until you went out of the business?

Ans. Same as Exhibit A.

58. What recipe did you use?

Ans. Same as we had of Atwood.

59. Did, or not, the Carter interest, after the dissolution, become Carter and Son?

Ans. It did.

60. What did you do with your branch of the business?

Ans. I sold part to M. F. Manning, of Mystic, Conn., and part to Wm. B. Dorman, of Georgetown.

81. What part did you convey to Manning, and what to Dorman?

169 Ans. To Manning, right to manufacture and sell on certain territory, and all the rest to Dorman.

62. Were, or not, said Dorman & Manning to have your rights to use trade-marks in common?

(Objected to.)

Ans. They were.

63. What style of label and bottle did Dorman use after your sale to him?

Ans. The same label and bottle that I did.

64. What style of label and bottle did Noyes & Manning, of Mystic, use?

Ans. All that I saw were the same as I used.

65. The Mr. Manning of the firm of Noyes & Manning was the one to whom you sold an interest, was he?

Ans. He was.

66. Were you acquainted with Moses F. Atwood, the son of said Moses Atwood?

Ans. I was, some.

67. How long did you know him?

Ans. I don't know how many years. I know there was such a person round town, and saw him occasionally.

68. Did said Moses F. Atwood ever have any interest in said bitters business?

Ans. He did not, to my knowledge.

69. Did he have any interest in, or any right to, the trade-marks of said Atwood's Bitters?

Ans. I never knew that he did.

70. Did he, so far as you know or heard, claim any right or interest in said bitters or the trade-marks?

Ans. I never heard of his having any.

71. Situated as you were, would you or not have heard of it if any such claim had been made?

(Objected to.)

Ans. I should.

72. Did you know Levi F. Atwood?

170 Ans. I did not, only by hearsay or reputation.

73. Was he the brother of Moses Atwood?

(Objected to.)

Ans. He was, and resided in Fairfield, Me.

74. State whether Carter & Dodge received from said Levi the writing now shown you.

(Objected to.)

Ans. They did.

75. When was this paper received by Carter & Dodge from L. F. Atwood?

(Objected to.)

Ans. I should say about the time of its date.

(MEM.—The plaintiff puts in evidence this paper, marked "Plaintiff's Exhibit G, April 6, 1876.")

76. What was the occasion of getting this paper from said Levi?

(Objected to.)

Ans. We supposed, as he had worked for his brother, he might go to manufacturing.

(MEM.—Plaintiff puts in evidence, under the foregoing stipulation, a bill of sale from Benj. S. Dodge to the plaintiff, dated March 30, 1875.)

77. Are you the Benj. S. Dodge named in this paper, and was the same executed and delivered by you?

Ans. I am. It was.

Cross-examination by CLIFFORD:

X. 1. Was Moses Atwood, to your knowledge, putting up any Atwood's Bitters in Georgetown before he sold to you and Carter?

Ans. He was.

X. 2. Was he, or not, selling them in kegs or barrels, or such like vessels?

Ans. I think he was.

171 X. 3. To whom was he thus selling?

Ans. I could not say.

X. 4. How much did he do? Was it not in a small experimental way?

Ans. He kept several hands at work.

X. 5. For how long did he so continue?

Ans. Ten or fifteen years.

X. 6. Did you put them up and sell them in that way?

Ans. Carter and myself did.

X. 6. The bottle used by Moses Atwood was like Exhibit F, was it not?

Ans. It was.

X. 7. The change to the fluted bottle was made by you and Carter, was it not?

Ans. It was.

X. 8. How long after you began business was this change made?

Ans. In about three years.

X. 9. Did you, or not, then discontinue in time the use of the bottle shaped like Exhibit F?

Ans. We did.

X. 10. Why was the change made by you?

Ans. We wanted a better bottle—stronger bottle.

X. 11. Was or not the form of bottle which you adopted a form known to persons in the drug and apothecary business?

Ans. Not that I know of.

X. 12. Had you ever seen such before?

Ans. Don't recollect.

X. 13. Who was the Bingham mentioned in the paper of date 29th Sept., 1852?

Ans. He was a man that worked for Mr. Atwood.

X. 14. Had he any right in the bitters that you know of?

Ans. Not that I know of.

172 X. 15. How long did he work for Moses Atwood, and was he not in company with him?

Ans. I could not say; think he was, a short time.

X. 16. Was his name on the paper to which the one of date Sept. 29th refers?

Ans. Don't remember.

X. 17. Is he alive now?

Ans. I think he is.

X. 18. Where does he live?

Ans. Lowell, last that I knew of him.

X. 19. Did he ever put up any bitters after the sale to Carter & Dodge?

Ans. Not to my knowledge.

X. 20. What was his business?

Ans. I could not say.

X. 21. Give his full name.

Ans. George Bingham.

X. 22. Did you and Carter ever recognize the claim of Bateman to put up these bitters as a valid one?

Ans. Yes; we did.

X. 23. Did you ever (i. e., you and Carter) admit Bateman's claim to be valid?

Ans. Did not.

X. 24. But you never interfered with him after the suit, did you?

Ans. We did not.

X. 25. Did he or not claim to have a right from Moses F. Atwood?

Ans. Don't know.

X. 26. When did Bateman begin to put up these bitters, before or after the date of the Carter & Dodge firm?

Ans. After.

X. 27. How long after?

Ans. Two or three years.

173 X. 28. And then he continued and got up a business in opposition to yours in these bitters, did he not?

Ans. He did.

X. 29. And his bitters were in time known in the market as his, were they not?

Ans. They were.

X. 30. How did his business in or sales of these bitters compare, in amount, with yours?

(Objected to.)

Ans. Not near as much.

X. 31. Did or not Moses F. Atwood work with Bateman? If so, when and how long?

Ans. He worked for him, but I could not say when or how long.

X. 32. How much did you pay Atwood for the recipes of the medicines you have named in your direct examination?

Ans. Between four and five thousand dollars.

X. 33. Was this paid down or out of the profits of the business?

Ans. Most of it down.

X. 34. How was the rest paid?

Ans. Short time afterwards.

X. 35. How long?

Ans. I couldn't say.

X. 36. Was or not his pay in part to come from the profits of the business?

Ans. It was not.

X. 37. Was there anything in the first paper to you from Atwood except a sale of the recipes for the various medicines?

Ans. I don't remember of anything else.

X. 38. Was there anything said about any trade-mark or marks?

(Objected to.)

174 Ans. We bought everything he had, and supposed we stepped into his shoes. The right to use his name was mentioned.

X. 39. Was there anything said about any trade-mark or marks at the time of this sale to you?

(Objected to.)

Ans. There was.

X. 40. By whom, what was it, and to what did it refer?

(Objected to.)

Ans. I do not remember. Talked about trade-marks; that is the most I remember about it.

X. 41. What trade-mark was talked about?

(Objected to.)

Ans. His trade-mark—his name.

X. 42. Was that what was then considered the trade-mark?

(Objected to.)

Ans. I suppose it was.

X. 43. Was not that what you supposed it was when you bought, and what was then understood to be it?

(Objected to.)

Ans. It was.

X. 44. Who adopted the twelve-sided bottle first, you or Bateman?

Ans. Carter and myself.

X. 45. Having purchased the trade-mark of Moses Atwood's name for these bitters, I suppose you felt at liberty to use any convenient form of bottle with the medicine, did you not?

(Objected to.)

Ans. We did.

X. 46. It was the name of Moses Atwood then which told, when on the labels, what the origin of the medicine was, was it not?

(Objected to.)

Ans. I think so.

175 X. 47. And so you purchased the right to use that name as a trade-mark, did you not?

Ans. Yes.

X. 48. The matter was well understood between you at that time, was it not?

Ans. I don't understand the inquiry.

X. 49. I mean whether you and Carter and Atwood were then acquainted with that medicine, so as to understand the nature of the bargain you made.

(Objected to.)

Ans. I suppose we were.

X. 50. It was then known to you, was it not, that the name of Moses Atwood was the trade-mark of the medicines, the recipes for which he sold you?

(Objected to.)

Ans. It was.

X. 51. Did the change from the smooth, round bottle to the twelve-sided one affect your sales of the medicine, so long as Moses Atwood's name was on the labels?

(Objected to.)

Ans. I don't know that it did.

X. 52. Did Moses Atwood claim any right in connection with this medicine, except the right to the exclusive use of his name to show whose bitters these were?

(Objected to.)

Ans. Yes; he claimed all the right there was.

X. 53. Was there at that time any other right than the right to the recipes and the use of his name?

(Objected to.)

Ans. That is all that I know of.

X. 54. Did you ever hear of Moses F. Atwood's having a right to the recipe of this bitter from his father?

Ans. No.

176 X. 55. At the time you sold to Dorman & Manning, was, or not, the manner of preparing these bitters known to them?

Ans. No.

X. 56. Was, or not, the paper of date September 29, 1852, the first paper executed by Moses Atwood concerning these bitters, to Carter & Dodge, or Carter, Dodge & Co.?

Ans. This was the first to Carter & Dodge.

X. 57. Had you, or not, been putting up the bitters before the date of that paper?

Ans. I had not; Carter had.

X. 58. Do you remember of any such paper as referred to and described in the few first lines of the paper of date September 29, 1852?

Ans. I do not.

Adjourned to Friday, at nine and one-half a. m.

X. 59. Do you ever remember of any conversation between you and Carter about such a paper as referred to in X. 58, before the adjournment?

Ans. I do not remember.

X. 60. Was there any dispute among you when the paper of September 29, 1852, was made?

Ans. Not that I remember of.

X. 61. Was there any particular kind of label attached to or going with Atwood's Extract of Sarsaparilla?

Ans. Not that I know of.

X. 62. Was there any label that was customarily put on the sarsaparilla bottles? If so, what was its shape and color, and was there anything in your purchase that covered that?

Ans. There was; it was yellow, rectangular in form, longer than wide; that was included with the rest.

X. 63. I ask you if you bought and paid for the use of that label, or only the right to use Atwood's name on the label?

Ans. We bought both.

177 X. 64. What was the label, if any, that went with the Dysentery Drops and form of bottle?

Ans. Bottle same as Exhibit A; smaller size; two ounced; square yellow label.

X. 65. Were all the labels, viz, for Canker Drops and Spinal Elixir yellow?

Ans. Most of them; a few were printed of a different color.

X. 66. Were there different colored labels—few or more—sometimes for the other medicines?

Ans. There was not; none that I know of.

X. 67. When you left the firm of Carter, Dodge & Co. and went to Rowley, was there any particular part of the right to these bitters assigned or given to you? If so, exactly what?

Ans. There was not.

X. 68. Was there any particular assignment of any portion or part to you at that time?

(Objected to.)

Ans. There was.

X. 69. What was it?

Ans. It was my routes that I usually traveled over and canvassed while I was in the firm.

(Objected to.)

X. 70. Was that in writing?

(Objected to.)

Ans. It was.

X. 71. Have you it now?
Ans. I think Mr. Dorman has it.
(Objected to.)
X. 72. State as nearly as you can what was the purport of that paper, and what it contained.
(Objected to.)
Ans. It gave me certain towns in Massachusetts, Connecticut, Rhode Island, and Maine; some in New Hampshire.
178 X. 73. Did the other members of the firm have parts given to them by similar papers?
(Objected to.)
Ans. They did.
X. 74. What parts, as nearly as you can remember, were set off to each of them?
(Objected to.)
Ans. They had the remainder.
X. 75. State how that remainder was divided among them, and what it covered.
(Objected to.)
Ans. It was the rest that was left of what we bought of Atwood. They, Moses and C. L. Carter, owned together.
X. 76. How long was it before you began to disregard each other's territorial rights in selling?
(Objected to.)
Ans. Don't remember.
X. 77. Do you remember how long you continued to sell over each other's territory? State as near as you can.
(Objected to.)
Ans. I should think about five years.
X. 78. Did you not, then, all of you, sell wherever you could get a market for your bitters, without regard to territorial divisions?
(Objected to.)
Ans. I did not.
X. 79. Did or not the others?
(Objected to.)
Ans. Should not wonder if they did.
X. 80. Do you not know that they did?
(Objected to.)
Ans. I have nothing more to say.
X. 81. What particular part of the routes you had did you divide off to Dorman, if any?
(Objected to.)
179 Ans. I sold him what I had left after selling to Manning.
X. 82. What did you sell to Manning?
(Objected to.)
Ans. Certain territory.
X. 83. Did you specify, in your sale to Manning, a particular part of the routes you had been traveling on?
(Objected to.)
Ans. I did.
X. 84. Did you give him no other rights?
(Objected to.)
Ans. I gave him the right to manufacture and sell in those towns.
X. 85. What were the towns you gave to Manning?
(Objected to.)

Ans. Part of New London and part of Fairfield, Connecticut. There were a few in another county.

X. 86. Can you give me the names of the towns Dorman had?

(Objected to.)

Ans. They were in Massachusetts and Rhode Island, Connecticut, Maine, and New Hampshire.

X. 87. How long has Nathan Wood, to your knowledge, been selling Atwood's Bitters?

(Objected to.)

Ans. I do not know. I have heard that he was selling them, but I could not say when or how long.

X. 88. Did you know that he was selling them when you were putting them up at Rowley?

Ans. I did not.

X. 89. Did you know of it when you sold to Dorman or Manning?

Ans. I could not say when I first did hear of it.

X. 90. Has it not been known to you for several years?

(Objected to.)

Ans. Yes.

180 X. 91. Did the parties at Georgetown ever make up their minds to attempt to stop Wood by a suit at law?

(Objected to.)

Ans. Think I have heard some talk about it.

X. 92. Did they ever determine to bring such a suit?

(Objected to.)

Ans. Not that I know of.

X. 93. If they had desired so to do, would you have joined them before your sale to Dorman & Manning, and paid your portion of the expenses?

(Objected to.)

Ans. I think I should.

X. 94. Did you ever offer so to do?

(Objected to.)

Ans. I did not.

X. 95. Do you know that Moses F. Atwood did not have the recipe for these bitters from his father?

(Objected to.)

Ans. I do know he didn't.

X. 96. Did Carter & Dodge, or Carter Dodge & Co., ever concede to Bateman that he had a right such as they had from Moses Atwood?

(Objected to.)

Ans. Not that I know of.

X. 97. Did not Bateman at one time claim to have obtained his right from Moses F.?

(Objected to.)

Ans. Not that I remember of.

X. 98. Did or not the two firms to which you belonged always claim that Bateman had no right?

(Objected to.)

Ans. I think they did.

X. 99. Did he use Moses Atwood's name?

Ans. He did.

181 X. 100. Why did you permit him to put up and sell the bitters as he did?

(Objected to.)

Ans. We tried to stop him and couldn't. The case was nonsuited.

X. 101. Up to the date of the separation of Carter, Dodge & Co., had not the bitters been put up at Georgetown, Mass.?

Ans. They had.

X. 102. And were they not known as so put up?

Ans. They were.

X. 103. For how many years as near as you can state, if you cannot state exactly?

Ans. Twenty years, about.

X. 104. Was this period made up by about ten years by Atwood himself and the same by your firms?

Ans. I think about fifteen years by Atwood and eight by our firms.

105. When the firm of Carter & Dodge dissolved was there any provision as to where you should manufacture the bitters?

Ans. I think there was.

X. 106. Where?

(Objected to.)

Ans. In Rowley.

X. 107. Was there any stipulation when you sold to Manning as to where he should manufacture?

(Objected to.)

Ans. There was.

X. 108. Where?

Ans. Mystic Bridge.

X. 109. Was that in writing?

Ans. It was.

182 Direct resumed by Mr. CHASE:

78. What did the purchase by Carter & Dodge from Moses Atwood in 1855 embrace?

Ans. All his stock and materials for manufacturing medicines, and accounts; the whole of his medicine business.

79. Did it or not also embrace all of Moses Atwood's trade-mark rights in respect to his medicine business?

Ans. It did.

80. What did Moses Atwood deliver to Carter & Dodge in pursuance of the sale?

Ans. All his accounts, receipts, medicine left with dealers on commission, and all his stock and materials.

81. Did or not such stock and materials include Moses Atwood's labels, bottle mould, and unfilled bottles?

(Objected as to form and otherwise.)

Ans. It did.

82. Do you mean that Atwood conveyed to Carter & Dodge all his right, title, and interest in all said Atwood's medicines of the several different kinds, and the business thereof, and his rights therein?

(Objected as above.)

Ans. Yes.

83. How long after the sale by Moses Atwood to Carter & Dodge did Moses Atwood leave Georgetown and go to Iowa?

Ans. I couldn't say; a year, I should think.

84. Did or not said Moses Atwood, after his sale to Carter & Dodge, ever claim or exercise any right or interest in said medicines, except as to the country west of Illinois?

Ans. He did not.

85. Did or not said Carter & Dodge come into the full possession and control of said Moses Atwood's medicine business after the sale?

Ans. We did.

183 86. Did anybody except Bateman ever dispute the exclusive right of Carter & Dodge to said Moses Atwood's medicine business, including trade-marks?

(Objected to.)

Ans. No.

87. Did or not Bateman base his claim upon some rights which he claimed to have from Moses Atwood?

Ans. I think he did.

88. What did you do with the old stock and materials which you purchased from Moses Atwood?

Ans. We disposed of it as soon as we could.

89. What form of label did Carter & Dodge use after their purchase from Atwood?

Ans. I think the same that is now on Exhibit A. They were not stereotyped at that time.

90. What did you do with Moses Atwood's unfilled bitter bottles?

Ans. We filled and sold them.

91. Previous to the contract of Sept. 29, 1852, between Moses Carter and Carter & Dodge, had or not Moses Atwood sold the bitters unbottled by the quantity to your partner, Moses Carter?

Ans. He had.

92. Do you recollect any other party to whom he had sold them unbottled by the quantity?

Ans. I do; Daniel French.

93. Do you know whether or not Moses Atwood supplied Daniel French with his bottles and labels to use with the bitters furnished him in bulk?

(Objected to.)

Ans. I think he did not. I don't know of my own knowledge.

94. At the time said Moses Atwood was selling to Carter and French his bitters, in bulk, was he or not also selling his bitters bottled and labeled?

184 Ans. He was.

95. How did he sell them?

Ans. He sent out teams.

96. Did he or not also send to dealers on consignment?

Ans. He did.

97. Did or not the several medicines purchased by you of Atwood each have its appropriate bottle and label?

(Objected to.)

Ans. It did.

98. And did or not these several labels each have the name of Moses Atwood on it?

Ans. They did.

99. Did or not said Moses Atwood claim to have originated and first put up and sold all of this line of medicines called Atwood's medicines?

(Objected as to form and otherwise.)

Ans. He did.

100. Did you ever know or hear of any person who claimed any right adverse to Moses Atwood, in respect to these several medicines or trade-marks?

(Objected to.)

Ans. No.

102. Did Carter & Dodge, after the purchase from Moses Atwood, in 1855, purchase and sell all of said Moses Atwood's line of medicines?

Ans. We did.

103. What kinds of bottles and labels did Carter & Dodge use with said medicines?

Ans. Same as Atwood's, except we changed some from round to fluted bottles. We used same names and labels.

104. Hand to the examiner a fac-simile of each of said labels.

Ans. I do, and annex them.

(And the same are put in evidence by the plaintiff, and are as follows:)

185 ATWOOD'S VEGETABLE DYSENTERY DROPS.

This is a certain cure for diarrhœa or dysentery, if taken at the first stage of the disease; and is a most certain remedy for cramp, cholera, colic, or any sudden pain in the stomach or bowels.

DIRECTIONS.—For an adult, take two tea-spoonsful in a little warm water, from three to five times day, as the case may require. In obstinate cases take the Jaundice Bitters every other day, sufficiently to operate as physic. It is safe in all cases.

Manufactured by Moses Atwood, Georgetown, Mass.

Price 25 cents.

ATWOOD'S VEGETABLE RHEUMATIC OR SPINAL ELIXIR.

A most certain cure for rheumatism, gout, swollen or weak joints, pains in the side, breast, or back. It is also good for all fresh wounds; it it very warm and healing.

DIRECTIONS.—Bathe the parts diseased with the elixir morning and evening, rubbing it smartly, then wrap up in flannel, which will give immediate relief, and often effects a cure by two or three times using. Is very beneficial to take inwardly, a tea-spoonful at each time of bathing.

Prepared by Moses Atwood, Georgetown, Mass.

Price 25 cents.

ATWOOD'S VEGETABLE CANKER DROPS.

This is a most certain cure for canker in all instances, if taken
186 in season. It is always safe, if used according to directions, and it has cured many of the most obstinate cases after all other medicines had proved unsuccessful.

DIRECTIONS.—It should be shaken thoroughly each time before using. Dose for an adult, from one to two tea-spoonsful, from two to five times a day, as the case may require. It should be taken clear to serve as a wash to the mouth and stomach. In very obstinate cases of canker in the throat, apply a poultice of Indian meal, salt, and vinegar on the outside of the throat, and mustard-seed and meal poultices to the bottom of the feet.

Prepared by Moses Atwood, Georgetown, Mass.

Price 37½ cents.

ATWOOD'S COMPOUND CONCENTRATED EXTRACT OF SARSAPARILLA AND COMFREY, WITH A COMBINATION OF OTHER VALUABLE VEGETABLES.

A most valuable medicine in the below-named diseases.

Chronic inflammation of the digestive organs, dyspepsia, or indigestion, flatulency, weakness and sour stomach, dropsy, stranguary, and

all other derangements of the urinary organs, which causes the most extreme suffering. Cases of this kind, of the most obstinate nature, have been relieved in a few hours with this medicine, after all others failed. It is also a most certain remedy for salt rheum, scrofula, and all eruptions of the skin, and the complicated diseases of females, which so often terminate in consumption.

N. B.—For dropsy, stranguary, and gravel it never fails of giving immediate relief.

DOSE.—From one to three table-spoonsful from three to five times a day, as the case may require.

187 ☞This extract is carefully prepared by the inventor and manufacturer of Atwood's Jaundice Bitters, which are so well known and satisfactorily tested by more than half of the United States.

M. ATWOOD.

Price 50 cents.

105. How long did Carter & Dodge, or Carter, Dodge & Co., continue to make said line of medicines and to use said labels?

Ans. Till we dissolved.

106. After the dissolution did you make this line of medicines, using said labels therefor?

Ans. I did.

107. How long?

Ans. Till I sold out.

108. Did Carter and Carter & Sons do the same?

Ans. They did.

109. Did Dorman do the same?

Ans. He did, as far as I know. I don't think he put up much of the Atwood's medicines except the bitters.

110. Was, or not, the sale of the medicines on each other's territory or routes by the several successors of Carter, Dodge & Co. acquiesced in by all after a short time?

(Objected to.)

Ans. I think it was.

Cross resumed by Mr. CLIFFORD:

X. 110. Did not Carter & Dodge buy out Moses Atwood's business, or the good-will, as it is called, at Georgetown, together with the right to use his name?

Ans. They bought everything belonging to the bitters business. We did buy the good-will. I supposed we had the right to use his name and everything belonging to the business.

188 X. 111. You say in your 110th redirect, that after a time the different firms acquiesced in the disregard of each other's territory; was not Bateman making and selling the bitters at this time?

Ans. He was.

X. 112. Do you know how the bitters sold in bulk by Moses Atwood to Daniel French were put up, for sale by said French?

(Objected to.)

Ans. He put them into a square panel bottle, one-half pint, rectangular flat bottle.

X. 113. Were they called Atwood's Bitters on the label?

Ans. They were called on the label Atwood's Vegetable Physical Jaundice Bitters.

X. 114. How were the bitters put up by French which sold to you him in bulk?

Ans. The same as those he bought from Moses Atwood, as far as I know.

X. 115. Did you not know at the time that French was using such a bottle?

Ans. I knew he did use such a bottle.

X. 116. Do you know if Moses Atwood knew it when he sold him the bitters in bulk?

Ans. I do not.

X. 117. Up to the time of Moses Atwood's sale of his business to Carter & Dodge, in the compounding of these medicines, had he not carried it on at Georgetown?

Ans. He had.

BENJAMIN S. DODGE.

189 *Deposition of William B. Dorman.*

WILLIAM B. DORMAN, called by complainant, and being by me duly sworn, testifies as follows, as a witness:

Examined by Mr. CHASE:

1. State your age, residence, and occupation.

Ans. Forty years old; residence, Georgetown, Mass.; occupation, apothecary.

2. How long have you resided at Georgetown?

Ans. About thirty-four years.

3. Were you acquainted with Moses Atwood, who formerly resided at Georgetown? If so, how long were you acquainted with him, and what business was said Atwood engaged in?

Ans. I was, since 1848. He was engaged in the manufacture of Atwood's medicine, so called.

4. Are you acquainted with the article of medicine in question in this suit, called Atwood's Bitters or Atwood's Vegetable Physical Jaundice Bitters? If so, how long have you been acquainted with it?

Ans. I am, and have been since I first knew Atwood.

5. In what manner did you first become acquainted with the bitters?

Ans. From common report.

6. Do you mean by common report that they were manufactured by Moses Atwood?

Ans. Yes.

7. Have you yourself put up and sold these bitters?

Ans. Yes.

8. How long have you put up the bitters?

Ans. Since the fall of 1867 till the sale of the plaintiff.

9. In what style, as to bottle and label, did you put up the bitters?

190 Ans. Similar bottle to Exhibit A and similar label, with slight variation in the border; lettering the same. The label is essentially the same.

10. By what right and authority did you use such bottle and label?

Ans. By terms of agreement with Benjamin S. Dodge.

11. What was your arrangement with Benj. S. Dodge in respect to said medicine?

(Objected to.)

Ans. I gave him a percentage of the gross amount made or sold.

12. How much royalty did you pay Dodge for the right to put up and sell the said medicine in the manner you have described?

Ans. One dozen of every twelve.

13. Under this arrangement who paid for the materials of which the bitters were composed and the bottles and labels?

Ans. I bought and sold in every respect as I would if sole proprietor of the recipe.

14. From whom did you obtain the recipe for making said bitters?

Ans. Directly from Benjamin S. Dodge.

15. How long did you continue to put up said bitters under this arrangement with Dodge?

Ans. Until I bought out Dodge in full on the 17th of April, 1873.

16. Did you, on or about April 17, 1873, purchase of said Dodge his then remaining interest in said Atwood's Bitters?

Ans. I did.

17. Is the paper now shown you the same, being a bill of sale from Benjamin S. Dodge to William B. Dorman, dated April 17, 1873, the sale from Dodge to you?

Ans. It is.

191 (MEM.—The complainant puts in evidence this paper, under the foregoing stipulation, and assignment endorsed thereon, from said Wm. B. Dorman to the plaintiff.)

18. Are you the Wm. B. Dorman named in this bill of sale, and were the papers executed and delivered as they purport to be?

Ans. I am. They were.

19. And is the Benj. S. Dodge therein named the same Benj. S. Dodge referred to by you?

Ans. He is.

20. What other parties, if any, at Georgetown, put up and sold said Atwood's Bitters?

Ans. Moses Carter & Son or Sons and L. H. Bateman.

21. At what time did L. H. Bateman begin to put up said bitters?

Ans. To the best of my knowledge, on or about 1857.

22. And how long did he continue to put up said bitters?

Ans. Until his death.

23. Did you work for Bateman while he was putting up said bitters? If so, when and how long did you so work for him?

Ans. I did, at several different times, of periods from one to two weeks to three to six months, between 1857 and 1866, inclusive.

24. What style of bottle and label did Bateman use?

Ans. Similar to Exhibit A.

25. From whom did Bateman claim the right to put up the bitters with the bottle Exhibit A?

Ans. I don't know as I ever heard him state in express words, but supposed he got his right from Moses Atwood. He gave me to understand that in some manner Atwood had been under obligation to him in previous years, and that Atwood didn't interfere with his making the bitters in consequence.

192 26. Do you mean that you were so informed in words by Bateman, or that you so understood from Bateman's course of dealing in respect to said bitters?

Ans. I judged so from Bateman's proceedings, he making the bitters in an open manner, as if he had a right to do so.

27. What was Bateman's business besides making bitters?

Ans. An apothecary.

28. Did Bateman ever claim or admit that the public had the right to make and sell Atwood's Bitters as he did?

(Objected to.)

Ans. He did not.

29. Were you acquainted with Moses F. Atwood, son of said Moses Atwood? If so, when, where, and how long were you so acquainted?

Ans. Yes, from 1848 to 1861, at Georgetown.

30. Do you know the age of said Moses F. Atwood? If so, state it.

Ans. He was born March 28, 1839.

31. How do you know this fact so as to state it thus precisely?

Ans. From personal inspection of the town records of Georgetown, Mass.

(MEM.—Plaintiff may put in evidence a certified copy of the record of birth of said Moses F. Atwood.)

32. How old was said Moses F. Atwood when you first knew him, and what were the means you had of being acquainted with him?

Ans. Nine years old. I was a school-fellow with him, and later by working in same shop with him.

33. Now, when you first knew him, was or not his father then carrying on the business of making his said bitters?

Ans. He was.

34. When did you go to school with him—what years?

Ans. I think in 1848 and '9, and perhaps some in 1850.

193 35. During those years was his father making said bitters?

Ans. To the best of my knowledge he was.

36. Did you during those years know of Moses Atwood's making said bitters by being at his shop, or seeing him put up the medicine?

Ans. I think during that time I was in his shop once or more. I saw peddler's carts there and boxes and bottles. I saw the paraphernalia of business and medicine.

37. And was it in this way you had a general knowledge that Moses Atwood was carrying on the bitters business?

Ans. It was.

38. During what years and where and for whom did you work in the shop with said Moses F. Atwood?

Ans. During the winter of 1860 and '61, at Georgetown, in a shop over L. H. Bateman's apothecary store.

39. What were you doing, and what was Moses F. Atwood doing when you and he worked for Bateman?

Ans. I was making cigars, and Moses F. Atwood prepared tobacco for the workmen and also did chores about the establishment.

40. When did you last see said Moses F. Atwood, and where?

Ans. The last time that I can recall to memory, he was a member of Company C, 19th Massachusetts Volunteers, and marching with his company, sometime in summer of 1861.

41. When did said Moses F. Atwood first leave Georgetown?

Ans. I don't remember.

42. Did he or not leave Georgetown with his father's family when they left Georgetown, whenever that was?

Ans. It is my opinion that he did.

194 43. From that time until you worked in Bateman's shop with him, as you have stated, had you seen him? If so, when and where?

Ans. I don't recollect seeing him until I understood he had returned from the West, and I saw him at work at Bateman's.

44. When was it you understood he had returned from the West?

Ans. Previous to 1861, about the spring of 1860.

45. Now, from the time you worked with said Moses F. Atwood until you met him in his company, in 1861, had you seen him?

Ans. Yes, for he continued at work for Bateman after I left.

46. Did said Moses F. Atwood have or own any interest in the business of making said bitters, to your knowledge?

Ans. He did not, save only as an employee.

47. Did said Moses F. Atwood ever, so far as you ever knew or heard, claim any interest in said bitters business?

Ans. No.

48. Was said Moses F. Atwood possessed of any property to your knowledge?

(Objected to.)

Ans. He was not.

49. State his condition as to his pecuniary means during all the time you knew him.

(Objected to.)

Ans. Dependent upon his daily wages.

50. Did said Bateman pay him wages during the time he worked for him?

(Objected to.)

Ans. He did.

57. Did said Moses F. Atwood claim to have any interest in said Bateman's Atwood Bitters business?

(Objected to.)

Ans. He did not.

195 52. Did you ever hear that it was claimed by any one until this suit that said Moses F. Atwood had any right or interest in said bitters business, or in the recipe of trade-marks, or otherwise?

(Objected to.)

Ans. Never.

53. State, considering your acquaintance with said Moses F. Atwood during so long a time and your connection with the bitters business [whether] you would or would not have been likely to have known of any such claim by said Moses F. Atwood, if any such had existed.

(Objected to.)

Ans. I should have known it.

54. During the time you carried on said bitters business on your own account, as purchaser and successor of the Dodge interest in said bitters business, how extensively did you put [up] and sell said bitters?

Ans. I supplied a peddler who traveled in Essex County and one or two adjoining counties. I also sold to Boston parties, and through them to New York parties.

55. During the time you put up and sold said Atwood's Bitters did you use the same style of bottle and label?

Ans. I did.

56. Please annex hereto a sample duplicate of the label used by you on said bitters.

Ans. I here annex it, and it is as follows:

ATWOOD'S VEGETABLE PHYSICAL JAUNDICE BITTERS.

This is an effectual cure for jaundice, headache, dyspepsia, worms, dizziness, loss of appetite, darting pains, colds, and fevers; it cleanses the blood from humors and moistens the skin. It is also good for liver complaints, strangury, dropsy, croup, and phthisic.

196 Dose for an adult, from half a table-spoonful to half a wine-glassful, according to the strength of the patient.

DIRECTIONS.—For jaundice or headache it should be taken every

morning, half an hour before eating. For dyspeptic complaints, spitting up food, and distress at the stomach, take a tea-spoonful immediately after eating. For worms, or any sudden attack of pain in the stomach, it should be taken immediately. For fevers it should be taken in large doses, once in four hours, while it operates smartly as physic; at the same time take a good sweat; then continue taking a little bitters every morning, sufficient to keep the bowels in good order. For liver complaints it should be taken the same as in dyspepsia, at the same time applying one of Atwood's Strengthening Plasters between the shoulders and wherever the patient has the most pain, which generally effects a cure in a short time, if administered in season. It is safe in all cases, and meets the approbation of all who have had an opportunity of using it.

Manufactured by Moses Atwood, Georgetown, Mass., and sold by his agents throughout th' United States.

57. In what way did you obtain the bottles which you used in putting up the bitters?

Ans. Through Howe & French, who formerly furnished them to Benj. S. Dodge, and made from the mould formerly used by Carter & Dodge, but latterly I used a bottle made from a similar mould, but slightly smaller, and obtained through the same parties. This last mould was copied from the first, but of a little less capacity.

58. How long have you been engaged in the drug and patent medicine business, either on your own account or employee?

Ans. Since Dec. 1865.

197 59. State whether, in your opinion, an inexperienced dealer, who was not familiar with the particular words and marks of the plaintiff's bitters, Exhibit A, and with the particular words and marks of defendants' bitters, Exhibit B, considering their similarity of names, would or would not be likely to be deceived into purchasing the defendants' bitters for the plaintiff's.

(Objected to.)

Ans. I think he would.

60. State whether, in your opinion, a customer desiring to buy the plaintiff's article at retail, and not being familiar with the particular words and marks of the respective bottles and labels, would or would not be likely to be deceived into purchasing the defendants' article for the plaintiff's.

(Objected to.)

Ans. I think he would.

61. Suppose, for instance, such customer going to a retail dealer and calling for Atwood's Bitters or Atwood's Vegetable Physical Jaundice Bitters, and desiring and intending to purchase the plaintiff's article, and being handed a bottle of the defendants' article, Exhibit A, would or would not [he] be likely to purchase it, thinking he had purchased the plaintiff's article?

(Objected to.)

Ans. He would.

62. From whom did you obtain the recipe for making the bitters so sold by you?

Ans. From Benjamin S. Dodge.

63. Were you then informed by Dodge that such recipe was the recipe which he had obtained from Moses Atwood?

(Objected to.)

Ans. Yes.

64. Did you, or not, at the time of the sale of your interest in the

bitters business with the plaintiff deliver to the plaintiff the recipe for making said bitters?

Ans. I delivered it to him as soon as I could copy it off.

198 65. Have you always kept the recipe secret?

(Objected to.)

Ans. I have.

66. State whether you and the other successors of said Carter, Dodge & Co. always respected each other's joint rights in the trade-marks of said bitters.

(Objected to.)

Ans. We did, so far as I have knowledge.

67. State whether the public respected the trade-mark rights of you and the other successors of said Carter, Dodge & Co. in the bitters.

(Objected to.)

Ans. They did.

(MEM.—The plaintiff puts in evidence under the foregoing stipulation, an agreement of bill of sale from Benjamin S. Dodge to William B. Dorman, dated Sept. 4, 1867.)

68. Is this the paper heretofore referred to by you as the first agreement between you and Dodge in respect to the bitters?

Ans. It is.

69. Was the paper executed and delivered as it purported to be?

Ans. It was.

(MEM.—The plaintiff puts in evidence, under the foregoing stipulation, a certified copy of record of the birth of said Moses F. Atwood, from the town records of Georgetown, Mass.)

Cross-examination by Mr. CLIFFORD, defendants' attorney:

X. 1. Was the paper referred to in your 68th direct the first agreement you made with Dodge concerning the manufacture of these bitters?

Ans. It is, to my recollection.

199 X. 2. When and why were the words "bitters" changed to medicines in the paper?

Ans. Because had the right to manufacture Atwood's other medicines as well as bitters. Don't recollect at what time.

X. 3. Were they made before or after the signing and execution of the paper?

Ans. I think they were made previous to signing of the paper, as I was uncertain about the length of time that Dodge would give me to manufacture bitters in, and so left the space for the term of years blank, which was, as you will observe, written with the same ink as the word "medicines."

X. 4. Do you know why the name of B. S. Dodge has the suffix of agent?

Ans. Of my own knowledge, I do not.

X. 5. State your information on this point from any source, and state if he explained it to you at the time of the execution of the instrument.

(Objected to.)

Ans. He made no particular or satisfactory statement. I had no information from any other source, preferring to keep agreement with Mr. Dodge a secret.

X. 6. Why did you, in your answer to X. 4, say, "of my own knowledge, I have not?"

Ans. Because I was not acquainted with Mr. Dodge' business or private affairs in any way.

X. 7. Do you now, or did you then, know of whom he was agent when signing that paper, or why he thus signed it?

Ans. I do not, and did not.

X 8. Was Dodge at that time under any embarrassments of business or property?

(Objected to.)

Ans. I could only suppose so from seeing the suffix to his name.

200 X. 9. Did you or do you know anything as to his circumstances at that time?

(Objected to.)

Ans I did not, and do not.

X. 10. Did you not, at the date of the paper, when he signed his name as agent, know or suppose that he was acting as an agent for somebody in selling you this alleged right?

Ans. Not until I saw his name so signed.

X. 11. Have you ever learned for whom he was thus acting? If yea, for whom?

(Objected to.)

Ans. I have an indistinct recollection that his wife was said to have owned the property.

X. 12. Has Dodge ever told you anything about it, or to this effect?

(Objected to.)

Ans. I do not recollect his making any particular remarks to that effect.

X. 13. Has he ever made any, whether particular or of any other nature, to you or in your presence, on this subject?

Ans. I cannot remember that he ever has; he was a man that never stated very clearly any of his affairs.

X. 14. Did you see Mrs. Dodge when she witnessed the paper, and was anything ever said by her to show that Dodge was acting as her agent in this matter?

(Objected to.)

Ans. I did see Mrs. Dodge, and as she was always the leading man I did not notice anything unusual. I cannot recall any conversation with Mrs. Dodge in regard to the matter. She approved of my having it (the right).

X. 15. Did you know the ingredients used by Bateman in making these bitters when you worked for him?

(Objected to.)

Ans. Yes, I think I did.

201 X. 16. Were they the same as the ingredients of the bitters which you put up and had bought from Dodge?

(Objected to.)

Ans. It was in the main similar in every particular.

X. 17. Was there any difference in the proportions of the different elements between the articles put up by these two persons, i. e., Bateman and Dodge?

(Objected to.)

Ans. When Dodge gave me the recipe he instructed me to use less alcohol than given in the recipe on account of its high price, and to the best of my knowledge Bateman observed the same rule.

X. 18. Was there any difference in the ingredients used by these two persons in any other particular or particulars?

(Objected to.)

Ans. I don't know Bateman's recipe from himself. I never saw him

go through the whole of the process, or more than a part of the process, of making bitters at any one time; but, so far as my observation extended, there was no essential difference.

X. 19. Were the Bateman Bitters stronger or weaker than those Dodge gave you the recipe of?

(Objected to.)

Ans. Weaker.

X. 20. Were yours stronger or weaker than Bateman's?

Ans. They did not vary essentially in strength.

X. 21. Did you know how Carter, or Carter & Dodge, or any of those firms, put up their bitters, so far as the ingredients used were concerned?

Ans. Only know of Dodge and Bateman, as previously stated.

X. 22. How many brands of these bitters have you known of?

Ans. Six.

202 X. 23. How were the bitters which you put up yourself known in the trade?

Ans. Known as Atwood's Vegetable Physical Jaundice Bitters.

X. 24. Did Bateman tell you that Moses Atwood was under obligations to him?

Ans. He did not.

X. 23. How did he then give you so to understand, as stated in direct (25)?

Ans. I do not recollect any particular conversation or time, but merely that I might have hazarded that supposition from inference from the manner in which he conducted his business.

X. 26. What was there in the manner in which Bateman conducted his business which led you to hazard the supposition that he was putting up the bitters, or was suffered so to do because Atwood was under obligation to him?

Ans. Because he was not interfered with by parties who would have had a right to do so had he been pursuing any legal business.

X. 27. Why did that lead you to suppose that Bateman was allowed to carry on the business because Atwood was under obligation to him?

(Objected to.)

Ans. Can only say it was an impression on my mind.

X. 28. When you were at work with Bateman, did you hear anything of an exclusive claim to a trade-mark on these bitters? If yea, from whom?

(Objected to.)

Ans. I never heard Bateman claim or admit that any other person, except Atwood and those parties to whom he might have given or sold a right, had any claim whatever.

X. 29. While you were at work for Bateman, did you ever hear any one make an exclusive claim of the right to any trade-mark on these bitters?

203 (Objected to.)

Ans. It was a well-known fact in town that Moses Atwood originated and made those bitters, and no one disputed his claim to the sole use of the term Atwood's Vegetable Physical Jaundice Bitters.

X. 30. (Question repeated.)

Ans. Bateman claimed to have a similar right to Carter & Dodge.

X. 31. (Question repeated.)

Ans. Can't say of any one except Bateman; and I answer as before.

X. 32. Did you ever hear Bateman say that the public did not have the right to put up Atwood's Bitters?

(Objected to.)

Ans. Never heard him say anything of the kind as to the public any way.

X. 33. Did Bateman sell his bitters wherever he could, or find a market?

Ans. I presume he did; but never asked him the question.

X. 34. Did the Carters do the same?

Ans. I know nothing about their business.

X. 35. When you were at work for Bateman, did he or not put his name on the labels?

Ans. I have an impression that he did at one time on the bottom; but, finding that they did not sell well with his name on the label, returned to Atwood's name.

X. 36. How many persons or firms, to your knowledge or information, were putting up what were called Atwood's Bitters in 1867, and again in 1873?

Ans. In 1867, six firms; in 1873, six firms.

X. 37. Name the persons or firms and their places of business at both of the years specified.

Ans. In 1867 M. Carter & Sons, L. H. Bateman, W. B. Dorman, all of Georgetown, Mass.; Mystic Bridge firm, of Connecticut, mem-
204 bers Noyes & Manning; Nathan Wood, of Portland, Me., and H. H. Hay, of Portland, who put up L. F. Atwood's. In 1873, same parties, except L. H. Bateman was the son of the Bateman of 1867.

X. 38. Were not the bitters put up by Nathan Wood so put up under the name of M. F. Atwood?

Ans. I never saw any of the bitters put up by Nathan Wood at that time.

X. 39. Have you not heard that he claimed the right under M. F. Atwood, and so put up the bitters?

(Objected to.)

Ans. Yes.

X. 40. Have you or not heard that the fac-simile of M. F. Atwood's signature was on his labels?

(Objected to.)

Ans. No.

X. 41. In 1867 did you ever hear either Bateman or the Carters or the Mystic Bridge firm claim any right to exclude said Nathan Wood from so preparing these bitters, limited to 1867?

(Objected to.)

Ans. Never saw Mystic Bridge firm; but it was the feeling amongst Georgetown parties that he ought to be stopped; and I recollect making the assertion to one of the other manufacturers of bitters—Bateman, I think, as I was more familiar with him at that time—that something ought to be done about it, and Bateman saying, on or near that time, that if the Georgetown parties would make a company together it would be better for all parties.

X. 42. (Question reread.)

Ans. From my knowledge I think Bateman did so claim a right, only he could not get other parties to co-operate with him.

X. 43. Did you hear of any such claim to any such right by either of said parties in 1873?

205 Ans. Nothing different from 1867, and limit answer X. 42 to between 1867 and 1871.

X. 44. Have you ever heard any of said parties since 1871 make

such a claim of right against said Wood up to time of the sale to the plaintiffs?

Ans. I cannot say certainly that I have.

X. 45. What was the trade-mark composed of which you bought of Dodge on these bitters?

(Objected to.)

Ans. The name Atwood's V. P. J. B., together with a label printed in black on a yellow paper, substantially as on Exhibit A, together with the name of Moses Atwood on bottom of the label, and this label pasted on an eight-ounce, long-fluted bottle (so called), together with the words Atwood's Bitter' or V. P. J. B., blown on the glass.

X. 46. Look at Exhibit A and state if label, words, color of label, form and size of bottle, constituted the trade-mark which you say you bought of B. S. Dodge. If there is anything on that exhibit not a part of that trade-mark, point it out.

Ans. Not answering to directory words, substantially correct.

X. 47. Has it the same descriptive words, to wit, Atwood's Vegetatable Physical Jaundice Bitters?

Ans. It has.

X. 48. Has it the same form of bottle with words blown in the glass?

Ans. Should judge so, as near as I can tell.

X. 49. And these were what you used when you put up the bitters, are they not?

Ans. Yes.

X. 50. And these are what, with the formula, you sold to plaintiffs, are they not?

Ans. Yes.

206 X. 51. Would a dealer in these bitters buy Exhibit B, and thereby be deceived into the belief that he was buying A?

Ans. Not if he was an expert; otherwise not.

X. 52. Do you really think that any man in his senses who had seen and known Exhibit A could with decent care mistake B for it?

Ans. A dealer might not be deceived as to appearance of the bottles, but when matter touched his pocket would buy or sell bitters where largest profit could be made.

X. 53. Then you mean that a dishonest dealer could say to an inexperienced purchaser that B was the same as A, and he would believe him and buy it?

Ans. I do.

X. 54. Would not the same be the case if such dishonest dealer should say the same of H. H. Hay's bitters?

(Objected to.)

Ans. Never saw H. H. Hay's Bitters.

X. 55. Will you look at bottle now shown you, and then give an answer to the preceding question, bottle marked Defendant's Exhibit I, April 3, 1876?

(Objected to.)

Ans. As Hay's Bitters have a different name at top, viz, "Improved Veg., &c.," I don't think there would be that chance for imposition.

X. 56. That answer would require, and supposes, does it not, that the buyer read the label?

Ans. It does.

X. 57. Now, suppose that buyer read the words "prepared by Nathan Wood, Portland, Me.," and also the notice with the statement

that each label bears his signature, do you think he would mistake that for "manufactured by Moses Atwood," Georgetown, Mass.?

Ans. Possibly not, if he understood the merits of all the Atwood Bitter controversy.

207 X. 58. Do you not known that all the parties, viz, Carter & Dodge, Carter, Dodge & Co., M. Carter & Son, the Mystic parties, and Dodge used the twelve-sided bottle, with the letters blown in the glass, like Exhibit A?

Ans. All those parties did latterly.

X. 39. Do you know of their ever using any other description of bottle?

Ans. I know that Carter and Bateman used, in their early manufacture, a smooth, long, eight-ounce bottle, old style.

X. 60. How many years has it been since that was discontinued?

Ans. Possibly since 1850.

X. 61. Have you not known of Bateman's using a flat rectangular bottle?

Ans. Yes.

X. 62. Since 1850, if that date is correct, do you know of any parties using a bottle like Exhibit B, except Wood and Hay, for these bitters?

Ans. I don't recollect of any.

63. Have not the bitters of the Mystic parties been known as the Mystic Bitters, Carter's as his, and Wood's and Hay's as theirs in the trade for some years?

Ans. I did so know them.

64. Do you not know that Carter's name has been on his labels, together with the statement that his were the only genuine?

Ans. I know that a small percentage that Carter sold he had a different label struck off for, while using at the same time the regular trade-mark label.

65. Have not the Bateman Bitters had his name on the label?

Ans. Since the death of the senior Bateman the fac-simile was printed across the label in red ink for a short time.

208 X. 66. Have you not known any distinct name for the Wood and Hay Bitters for the last seven or eight years, for instance?

Ans. Not particularly, as we knew only Moses Atwood's make, or those put up under that signature.

Redirect:

70. You say in your cross-examination that it was the feeling among the Georgetown folks that Nathan Wood ought to be stopped from selling the bitters. Whom do you mean by the Georgetown folks?

Ans. I mean the parties who were directly or indirectly engaged in manufacture of the bitters, that is, B. S. Dodge, M. Carter & Son, and L. H. Bate-man.

71. I don't ask you to specify particular names and places, but can you state generally that you had conversations with such parties, in which they stated Wood ought to be stopped from selling said bitters?

(Objected as to form.)

Ans. I cannot recollect now. I have had such talk with Luther Carter about Nathan Wood.

72. State, as nearly as you can, between what years you had conversations, if any, with the Georgetown folks in respect to stopping Wood.

(Objected to.)

Ans. I recollect having the conversation with L. H. Carter about the Atwood Bitters, but whether Wood's name was brought in at that time I don't recollect; but I can say positively that his name was brought up and discussed in that relation on night previous to the sale to the plaintiff.

73. In answer to your 22d X. interrogatory, that you knew of six kinds of these bitters being put up, do you mean by that the kinds specified by you in your answer to the 37th X. interrogatory?

209 Ans. I do.

74. So far as you know, were not Wood's Bitters sold principally in the State of Maine?

Ans. I think they were.

75. Did any parties outside of Wood ever say or admit, to your knowledge, any right in Wood to put up said bitters?

(Objected to.)

Ans. No such right was ever admitted.

76. You say in your cross-examination that Bateman claimed a similar right with Carter & Dodge to use said trade-marks? Explain what you mean by similar.

(Objected to.)

Ans. That he had the legal right to make the bitters and put them up in the same style of bottle, and using the same label as Carter & Dodge.

77. Do you, or not, mean that Bateman claimed to have derived his right from same source as Carter & Dodge, to wit, Moses Atwood?

(Objected to as to form.)

Ans. I do.

78. Did you make the bitters sold by you according to the Dodge recipe, with the exception of weakening them a little by using a less quantity of alcohol?

Ans. I did in every essential particular.

Cross resumed:

67. Did you always use the same amount of medicinal substances, not now referring to alcohol, to make a given amount of bitters, and did you always follow the Dodge recipe as to the amount of medicinal substances for a given amount of the bitters?

(Objected to.)

Ans. I did not vary them in any necessary particular. They always had the same amount of physic in them.

WM. B. DORMAN.

210 *Deposition of Eli B. Johnson.*

Examination of ELI B. JOHNSON by Mr. CHASE:

1. State your age, residence, and occupation.

Ans. Age, nearly forty-four; residence, Burlington, Vt.; occupation, dealer and manufacturer of proprietary medicines.

2. What is the name of your firm?

Ans. Henry, Johnson & Lord.

3. Are you acquainted with the Atwood's Bitters in question in this suit?

Ans. I am.

4. How long have you been acquainted with it?

Ans. Over twenty years.

5. In what ways?

Ans. First as a traveling salesman for J. M. Henry, of Waterbury, Vt., from about 1852 or '3 to 1861 for J. M. Henry & Sons, mostly in New England, and in New York, and some in Canada. Then I sold as a member of the firm of J. F. Henry & Co., in Waterbury, till 1867 or '8. I remained in the firm till 1871, and have continued selling up to the present time, except from 1871 to 1874 or '5. I sold some from 1871 to 1873 or '4, but not much.

6. Of whom was the article purchased which you have sold during the twenty years?

Ans. First of Carter & Dodge, or Carter, Dodge & Co., Georgetown, Mass., and their successors, to wit, M. Carter & Son, M. Carter & Sons, and L. H. Bateman.

7. In what style of bottle and label was the article put up as sold by you?

Ans. Same as now put up by the Manhattan Medicine Company, except it didn't have on the proprietary stamp at first.

8. And same as Exhibit A?

Ans. Yes.

211 9. By what name is the article known in the market?

Ans. As Atwood's Bitters; sometimes Atwood's Jaundice Bitters.

10. How is said article generally called for by purchasers, wholesalers, retailers, consumers?

Ans. As Atwood's Bitters, Atwood's Jaundice Bitters. It varies in my experience.

11. How does the article stand in the proprietary medicine trade, in respect to being known?

Ans. It is a good selling article and well known.

12. How in regard to its sales, within the last twenty years?

Ans. Largely on the increase.

13. Did or not Bateman have his name on the label of the bitters put up by him, for a time before he died?

Ans. I think he did. My impression is, it was in red ink across the label.

14. How long, according to your recollection, did Bateman mark his bitters with the red ink signature?

Ans. I cannot tell.

15. Did the first bitters you had of Bateman have his name on the label?

Ans. It is so long ago I can't tell.

16. Did, or not, some of the bitters you had of Carter have Carter's name on the label?

Ans. The last few years they did.

17. During the time you have been acquainted with this article, do you know who the trade generally have considered were the rightful proprietors of this article?

(Objected to.)

Ans. It is generally understood Carter, Dodge & Co. and their successors.

18. Has it, or not, during your acquaintance with the article,

212 been generally known and well understood that the manufacture and sale of said article had passed from Moses Atwood to Carter & Dodge and their successors?

(Objected to.)

Ans. It has.

19. State whether, in your opinion, dealers and consumers are likely to be deceived into purchasing the defendants' article, B, for the plaintiff's article, A?

Ans. My opinion is the consumer would be most likely to be deceived; and any new dealer that was not acquainted with the article would be likely to be deceived.

20. Would, or would not, a person desiring to purchase the plaintiff's article for consumption, and having heard it recommended or seen it advertised as Atwood's Bitters or Atwood's Vegetable Physical Jaundice Bitters, and who had not compared the plaintiff's bottle and label with defendants' bottle and label, be likely to be deceived into purchasing defendants' article for the plaintiff's?

Ans. I think he would.

21. Did you have a conversation with the defendant Nathan Wood, about February or March, 1875, in respect to the bitters and trademarks in suit?

Ans. I did.

22. State what the conversation was.

Ans. I called on Nathan Wood & Son, at their store in Portland, and had conversation about Manhattan Medicine Co. and Atwood's Bitters. I told them the Manhattan Medicine Co. had become sole proprietors of Atwood's Bitters; that I considered both bottles that Nathan Wood & Son were manufacturing as liable to deceive the public and a fraud, and that the title from Moses Atwood had descended down to Carter & Dodge and their successors; and that they, the said Nathan Wood & Son, had no right to deceive the public or to sell an imitation article. Mr. Wood said he had no right to use the label Exhibit A, or bottle,
213 but that he had some calls for that style of Atwood's Bitters, had procured a mould, and that if I would purchase the mould at a cost of $20, what he paid for it, that he would give up said mould and style of label. I told him rather than have a lawsuit and fuss, that I thought he better change the label on Exhibit B to Wood's Bitters. He said then he had a right from Moses F. Atwood, but that he would give up the label and mould, Exhibit A, for $20, and everything pertaining to it. I told him I would send him the $20 if the Manhattan Medicine Co. agreed to it.

23. Did you send the $20?

Ans. I caused it to be sent.

24. Did the defendants give up the mould?

Ans. They did not.

25. When you told Nathan Wood you thought he better change his his label, Exhibit B, to Wood's Bitters, what reply did he make?

Ans. There was so much conversation I couldn't tell exactly about its coming in. I can give the pith of what was said, but not the language in the order in which it was said.

26. Can you give the substance of what was said between you and Nathan Wood on this occasion?

Ans. I can.

27. Now please answer the 25th question.

Ans. He said perhaps it would be as well.

28. In what part of the conversation did Wood say he had a right from Moses F. Atwood?

Ans. It was immediately upon saying as stated in my last answer.

29. Did Wood show you any bill of sale or paper of any kind signed, or purporting to be signed, by Moses F. Atwood?

Ans. He did not.

30. Did he tell you he had any such paper?

Ans. Think he did not.

214 31. Did he tell you how or when he got his right from Moses F. Atwood?

Ans. He did not.

32. What, if anything, did you say to Wood in respect to his using that part of his label on the round bottle which was like the plaintiff's label?

Ans. I said it was the plaintiff's trade-mark and label, and he had no right to use them.

33. Did you purchase of Wood at that time any of his fluted bottle Atwood's Bitters?

Ans. I did, one bottle, and paid him twenty-five cents.

34. What became of the bottle which you purchased?

Ans. I delivered it to the Manhattan Medicine Co., and afterwards it was carried to Portland and placed on file in the U. S. circuit court clerk's office as an exhibit.

35. How many of said fluted bottles of Atwood's Bitters, such as you bought, did defendants have on hand at the time you bought this bottle?

Ans. I should say from two to four, perhaps five, gross.

36. Where were these imitation fluted bottle Atwood's Bitters?

(Objected to.)

Ans. They were piled up in Wood's store.

37. Did you, or not, see some bottles of said bitters said to have been purchased of defendants by C. E. Parker?

Ans. I did.

38. Was the bottle purchased of the defendants by you the same kind as those said to have been purchased by Parker of defendants?

(Objected to.)

Ans. It was.

39. Can you now recollect, so as to state without seeing the two bottles together, what, if any, difference there was between the defendants' fluted bottle Atwood's Bitters and the plaintiff's?

215 (Objected to.)

Ans. All the difference was that the word "genuine" was blown in the glass of Wood's bottle. The labels were the same.

40. Do you recollect the Wood imitation fluted bottle had on it "Price 37½ cents?"

Ans. I can't say for certain; my impression is it had not.

41. At this conversation did Wood tell you when he had his fluted bottle mould made?

Ans. He did not.

42. Did he tell you where he had it made?

Ans. He did not.

43. At the time of this conversation, who owned the trade-marks of said Atwood's Bitters?

Ans. The Manhattan Medicine Co.

44. From whom had the plaintiff obtained such trade-marks?

(Objected to.)

Ans. From Luther F. Carter and the other heirs of Moses Carter, Wm. B. Dorman, Noyes & Manning, and the Bateman heirs.

45. Had the Manhattan Medicine Co. then paid the purchase-money for said bitters business and trade-marks?

(Objected to.)

Ans. They had for a part of it.

46. And were the bills of sale or deeds afterwards passed?

Ans. They were.

47. Did you inform Nathan Wood, at time of this conversation, that the Manhattan Medicine Co had became the sole owner and proprietor of the bitters and business and trade-marks?

(Objected to.)

Ans. I did.

216 Cross-examination by Mr. CLIFFORD:

1. How long have you known Atwood's Vegetable Physical Jaundice Bitters as an article in the market?

Ans. Over twenty years.

2. Do or not those words and that name together denote a class of goods?

Ans. I think they do.

3. But would these words and this name inform you where and by whom they were prepared?

Ans. They would not of themselves.

4. Previous to the sales to the Manhattan Medicine Co., what other words would have been necessary to inform a person like yourself, familiar with this class of goods, where and by whom they were prepared?

Ans. I don't understand it is necessary to be informed where they are manufactured. Very few medicines are told that way; most of them have circulars around the bottle, with full directions and particulars. I have answered the question.

X. 5. (Question repeated.)

Ans. I think I have answered it in full.

X, 6. Would the mere words Atwood's Bitters necessarily bring to your mind the article Exhibit A without the other parts, to wit, the bottle, the label, the words Georgetown, Mass., &c.?

Ans. It would.

7. Then you state, do you, that if you should see the words Atwood's Bitters printed in a newspaper, for instance, with nothing else, you would know that it meant nothing else but an article like Exhibit A?

Ans. I should [take] that as the meaning of it.

8. Would you understand it to mean an article having the label like the one annexed to Luther F. Carter's 86th direct?

217 Ans. I should not.

9. Would you understand it to mean an article having the label with the name L. H. Bateman on it, and stating that none are genuine without that signature?

Ans. It might have the name L. H. Bateman on it. I should understand it to mean Atwood's Bitters.

10. That is, you would understand the words Atwood's Bitters to mean Atwood's Bitters, would you?

Ans. I would.

11. And nothing else?

Ans. I understand Atwood's Bitters to mean the plaintiff's article.

12. Up to what time were you employed by John F. Henry, Curran & Co., or the plaintiffs?

Ans. I think November 15, 1875, or about that time.

13. Do you own any stock in the Manhattan Medicine Co.?

Ans. The firm of which I am a member does.

14. You are the Mr. Johnson that procured the execution of some, if

not all, the papers of transfer from the Georgetown parties and others to the plaintiff, are you not?

Ans. I am.

15. Are you acting in any manner for the plaintiff now?

Ans. The firm of which I am a member buy and sell the bitters. I have no further interest.

16. Has your firm an agency?

Ans. We buy the bitters of John F. Henry, Curran & Co. We have no agency.

17. Do you, and have you not, aided the counsel of the plaintiff in this suit in the procuring of evidence and the attendance of witnesses, &c.?

Ans. Not particularly.

18. In the time previous to the purchase by the plaintiffs, dur-
218 ing which you have bought and sold the bitters, have you or not mostly dealt in those having the label of Exhibit A?

Ans. We bought of all the Georgetown parties, mostly of Carter and Bateman. I don't know but all. I should say we did buy mostly of that label; some had Bateman on it and some Carter.

19. Did or not those having the label like the one annexed to Carter's 86th ans. bear but a small proportion to those like Exhibit A?

Ans. I should say we sold about equal amounts.

20. What were the prices per gross of the different kinds?

(Objected to.)

Ans. I think always the same, $27.

21. How long ago did you go out of the business?

Ans. I was out about three years. From about 1871 or '72 to last December, 1875, three years or more.

22. Have you never dealt in an article of this name which sold for $16 a gross, or thereabouts?

(Objected to.)

Ans. I never have.

23. Have you not known, or do you not know, that there was such an article in the market?

(Objected to.)

Ans. I heard there was.

24. By whom put up?

Ans. I don't know.

25. By whom did you hear?

(Objected to.)

Ans. Parties in Mystic.

26. Did you ever hear they were put up by Carter, of Georgetown?

(Objected to.)

Ans. I heard talk of that kind.

27. Were these good bitters; sound?

(Objected to.)

219 Ans. I don't know.

28. Did ever you know or hear of their not giving satisfaction, or spoiling, becoming sour, &c.?

(Objected to.)

Ans. I never so heard till yesterday, in Mr. Webster's testimony.

29. But you never dealt in them, did you?

Ans. Never.

30. Have you ever seen any of them?

(Objected to.)

Ans. Not to notice them particularly.

31. Have you or not noticed them sufficiently to know they bore a label, and were in a bottle substantially like Exhibit A?

(Objected to.)

Ans. I understand they did.

32. Now, you have stated that a purchaser when buying Exhibit B might be deceived into the belief that he was buying Exhibit A. Now, do you still adhere to that opinion, if the purchaser was not a fool and had ever seen the two articles?

(Objected to, the witness not having stated the proposition in the form put by defendants' counsel, as will be seen by reference to the 19th and 20th direct.)

Ans. I adhere to the 19th and 20th.

33. You have stated that "consumer would be most likely to be deceived," in answer to a question whether "dealers and consumers are likely to be deceived into purchasing defendants' article, B, for the plaintiff's article, A." Do you still adhere to that opinion under the conditions of the preceding question?

Ans. I do.

34. Then do you or not also think that if the dealer were dishonest enough to offer the $16 article, put up as you have described, at
220 $27 the gross, that consumers and new dealers would be likely to be cheated out of $11 of their money on every gross they bought?

(Objected to.)

Ans. They might; I can't say.

35. If the $16 article was put up like Exhibit A, and the $27 article in the same way, are you not almost as certain that it might possibly be used to cheat the public as you are that Exhibit B might be passed off for Exhibit A?

(Objected to.)

Ans. It would certainly pay a very large profit.

36. In the patent-medicine trade is not the value of the label or trade-mark proportioned to the profit made on the medicine?

(Objected to.)

Ans. I should say it was.

37. If a consumer or new dealer called upon an experienced dealer for the article Exhibit A, such dealer might, if he chose, deceive the purchaser and sell him B. Is that your opinion?

Ans. I think he might.

38. So if the purchaser knew nothing of the appearance of Exhibit A, the vender could sell him anything of that name, if he was sufficiently dishonest, might he not?

Ans. I think he could.

39. But such sales would be owing, would they not, to the experienced dealer's dishonesty?

Ans. Not necessarily.

40. Will you now explain how an experienced dealer could discriminate by the appearance of the bottle and label between the $16 and the $27 article, when they are put up in the same way?

Ans. I cannot; I never dealt in the $16 article.

41. What did Bateman's Bitters sell for per gross?

Ans. Formerly same as Carter's; I think $27 a gross.

42. What was it afterwards?

221 Ans. I don't know as it was ever changed.

X. 43. Did you ever hear of its being changed?

Ans. Can't say that I ever did. I know there was a rivalry between the bitters.

X. 44. Where is the bottle you say you bought of Nathan Wood?

Ans. It is an exhibit in the court at Portland.

45. What did you pay for it?

Ans. Twenty-five cents.

46. Was it like Exhibit B?

Ans. It was not.

47. Did you ask him for that particular kind of bottle?

Ans. I asked for both kinds.

48. Did you get both kinds?

Ans. We examined both kinds in his presence, in his store.

49. Who was with you?

Ans. I was alone.

50. At whose request or suggestion did you go there?

Ans. I went in the interest of the Manhattan Medicine Co.

51. You went, did you not, to procure a bottle to be used in this case?

Ans. I went to satisfy myself that he was manufacturing an imitation article. I did not go to procure it to be used in this case.

52. What did you say in asking for the bitters?

Ans. I asked to see the Atwood's Bitters that he was manufacturing.

53. What did he show you in reply to that first?

Ans. He showed me both bottles at the same time, or nearly the same time.

54. Will you state that you were not informed that they were not selling the article like Exhibit A?

222 Ans. He said he was selling an article like Exhibit A, that some called for them, and he had a mould made, but did not sell a great many of them.

55. Do you state that there was in his store at that time from two to perhaps five gross which you saw of articles like Exhibit A?

Ans. From two to four or five gross of the imitation article in the twelve-sided bottle.

56. Were they or not like Exhibit A?

Ans. The label I think was exactly like it. The word genuine was blown in the glass of the imitation.

57. How do you know they were imitation? Do you know how the article was compounded, and do you know how the plaintiffs compound theirs?

Ans. From comparing the label and bottle; I don't know how the article was compounded; I don't know how the plaintiffs compound theirs.

58. In what way were these bottles put up, in cases, or how?

Ans. One-half dozen bottles in a package, and piled up on the floor.

59. Did you open them?

Ans. I opened some of them.

60. Did you tear open the wrappers, do you mean?

Ans. I untied the package and took out the bottle.

61. Do you state that Wood agreed to sell you the mould for $20?

Ans. He did.

62. Do you state that Wood agreed to give up the label and mould for $20?

Ans. I do.

63. How many other persons were in the room while you were there?

Ans. Can't say; think his son was there part of the time. I saw his son.

223 64. What was the retail price of article like Exhibit A, per bottle, up to the time you went out of the business as you have stated?

(Objected to.)

Ans. Thirty-five or thirty-seven cents.

65. What is the retail price now?

Ans. I think it is thirty-five cents.

66. Did you ever buy any of the bitters of any one but Bateman [and] Carter, up to the time you went out of business?

Ans. Not direct; we bought of the wholesale drug trade.

67. Of whom?

Ans. Usually of Goodwin; sometimes of Burr.

68. Did you ever buy any of Charles E. French?

Ans. I never did. We generally bought direct of Bateman or Carter or successors.

Direct resumed by Mr. CHASE:

48. Is it or not known in the trade by whom and where the plaintiff's article is put up?

Ans. It is.

49. Are or not circulars wrapped around and sent out with the plaintiff's bitters?

Ans. They are.

50. Will you produce one of such circulars?

Ans. I will. (Witness produces the circular and the plaintiff puts the same in evidence, and the same is hereto annexed, as follows:)

ATWOOD'S VEGETABLE PHYSICAL JAUNDICE BITTERS, FOR BILIOUS COMPLAINTS.

This preparation, composed of the purest and best extracts of vegetable substances, has been used by all classes of society for the
224 last thirty years. From Maine to Florida, from the Atlantic to the Pacific coasts, these bitters have found their way and met with favor everywhere. Their success in curing the following diseases is unequaled:

Jaundice, headache, dyspepsia, loss of appetite, worms, indigestion, dizziness, costiveness, general debility, fever and ague.

The public is here presented with a tonic alterative remedy that has no superior. Try it, and you will seek no further for a remedy for bilious complaints. This compound is purely vegetable, and those who fear, not without reason, to make use of the quack nostrums and poisonous drugs with which the market is flooded may rely upon this as safe and effective. All who are suffering with general nervous debility, loss of appetite, lassitude, will find this the safest and best stimulant to the vital energies they have ever used. Those troubled with nausea, sour stomach, indigestion after taking food, will find in this immediate relief. It restores the appetite, invigorates the digestive organs, promotes healthy secretions and lively circulation, moistens the skin, and imparts new life and vigor to the whole system. It cleanses the system from humors, removes morbid secretions, and stands unrivaled as a general purgative remedy.

JAUNDICE AND DYSPEPSIA soon give way before its wonder-working influence. Persons subject to sick headache are cordially invited to test this remedy. We believe it will cure nine-tenths of the cases, and are, therefore, disposed to warrant it in every case. Should it fail to

give relief, our agents are authorized to refund the money to those who may return the bottle after giving it a fair trial.

FOR FEVER AND AGUE this remedy stands unequaled, and
225 has never been known to fail in any instance where a thorough trial has been given it. For this complaint it should be taken in doses every morning and evening until the chills are broken, then continue to use the bitters in smaller doses until the disease is thoroughly eradicated from the system.

We would add this to the long list of preparations warranted to cure all the "ills that flesh is heir to," but have ourselves such confidence in its efficacy that we do not hesitate to warrant it in all cases for which it is recommended.

No family should be without a bottle of genuine Atwood's Bitters.

Sold everywhere.

MANHATTAN MEDICINE COMPANY,
Proprietors of the Genuine Atwood's Medicines,
To whom all Orders must be Addressed.

51. Is this circular wrapped around the bottle of the plaintiff's article?

Ans. It is.

52. Was it, or not, known in the trade by whom Atwood's Bitters was put up previous to the transfer to the plaintiffs?

(Objected to.)

Ans. It was.

53. State what is the practice in the patent-medicine trade in respect to retaining the original label with the original proprietor's name upon it when the business of putting it up has changed hands.

(Objected to.)

Ans. As far as I know they keep the label and trade-mark as near the same as possible.

54. What experience have you had in respect to this?

Ans. I have had a lifetime experience in the business, and our firm own a large number of trade-marks of proprietary medicines.

226 55. Previous to the tranfer of the plaintiff, what did the term Atwood's Bitters' or Atwood's Jaundice Bitters designate? Those put up by whom?

(Objected to.)

Ans. They were understood to be Georgetown Bitters, Carter and Bateman.

56. Have you dealt in other genuine bitters besides the Atwood Bitters?

Ans. We have in the general trade.

57. Have you ever known such other bitters to sour and spoil?

Ans. I have.

60. How often?

Ans. It is a rare case. I have known Vinegar Bitters to sour and spoil.

Cross-examination resumed:

69. Do you know of any of the $27 Atwood's Bitters fermenting, souring, and exploding?

Ans. I do not.

E. B. JOHNSON.

Deposition of Loren B. Lord.

Examination of LOREN B. LORD by Mr. CHASE:

1. State your age, residence, and occupation.

Ans. I am thirty-four; residence, Burlington, Vermont; occupation, am in the medicine business of the firm of Henry, Johnson & Lord, of Burlington.

2. How long have you been engaged in the proprietary medicine business?

Ans. I commenced as employee in 1863, and have been engaged in it ever since.

3. Are you acquainted with an article of medicine called Atwood's Vegetable Physical Jaundice Bitters?

227 Ans. Yes.

4. How long?

Ans. Ever since I have been in business.

5. State what acquaintance you have had with it.

Ans. I sold them as clerk in Montreal in 1863, and continued till I left in fall of 1864 or spring of 1865, and sold for John F. Henry & Co. Then I went to Waterbury, Vt., and sold as traveling agent for the same firm, who had a house at Waterbury, and continued till Sept., 1865, some five or six months, and during this time sold the bitters on my routes. I traveled chiefly in Eastern Vermont and northern part of New Hampshire. Then I commenced work for Demas, Barnes & Co., of New York City, as traveling salesman, and went through the Southern cities to New Orleans, where the house had a branch styled Barnes, Ward & Co. I remained, traveling in the Southern States that winter. Then I returned and went to Montreal in spring of 1866, and spent the summer in Canada. That fall I returned and went to New Orleans again, and spent the winter traveling in the South for the New Orleans branch. Spring of 1867 I returned to New York and dissolved my connection with the house, and went into the firm of Henry & Co., and continued there about two and a half years, and since then have been in business on my own account. During all the above times I have been selling Atwood's Bitters.

6. In what form as to bottle and label did you sell the bitters?

Ans. In the style of bottle and label Exhibit A.

7. Of whom were the bitters purchased by you while traveling in the United States and Canada, as above stated; that is, what manufacturer?

Ans. As far as I know, they were purchased of Bateman or Carter,
228 of Georgetown; I know of some being purchased of them, being present when some purchases were made. I was taking orders for Atwood's Bitters, and was supplied by the firms I traveled for.

8. Since you have been in business for yourself with the several firms as you have stated, from whom have you purchased your supplies of Atwood's Bitters for your trade?

Ans. L. H. Bateman and Carter till the Manhattan Medicine Co. became the owner, and since of them.

9. State whether or not, since your acquaintance with the article, Atwood's Bitters has been a regular and well known article in the trade.

Ans. It has.

10. By what name is the article called and known?

Ans. In writing orders we always say Atwood's Bitters, but that is

not the full name; the full name is Atwood's Vegetable Physical Jaundice Bitters.

11. Now please state what name or designation is generally applied to the article by the trade.

Ans. Atwood's Jaundice Bitters.

12. Is or not the article more frequently spoken of and called for by the shorter name, Atwood's Bitters?

(Objected to.)

Ans. No, sir; not in my experience.

13. State whether or not the sales of Atwood's Bitters put up as above described have had large sales.

Ans. Yes.

14. Since your knowledge of the article, who have been considered by the trade, so far as your knowledge goes, the rightful owners of its trade-marks?

(Objected to.)

Ans. L. H. Bateman and Carter, of Georgetown. I don't remember the style of Carter.

15. Whom do the trade now consider, so far as you know, the owner of the trade-mark?

(Objected to.)

Ans. The Manhattan Medicine Company.

229 Cross-examination by Mr. CLIFFORD:

1. Why were portions of the bitters which you have sold bought of Bateman and other portions of Carter?

Ans. Those that Henry & Co. bought; we have an exchange trade with both concerns. Sometimes a customer, used to having L. H. Bateman's, preferred that kind.

2. Were there not certain customers who called for the Bateman Bitters, and others who called for the Carter?

Ans. Occasionally we had customers who called for the Bateman, and occasionally for the Carter; that is the distinction between the two.

3. And the labels of these two manufacturers bore their names, did they not?

Ans. When I first commenced selling they did not, and afterwards they did.

4. Did or not the Carter label contain the statement that Carter's were the only genuine?

Ans. I don't remember.

5. Did or not the Bateman labels have the name of Moses F. Atwood?

Ans. I think not; I think it had the name of Moses Atwood.

6. Was it or not well known to dealers in the trade by whom the two classes of bitters were put up?

Ans. By the wholesale trade it was. By the retail trade it was not, as far as I know.

7. What was the price for which the bitters sold per gross? Were there different prices? If so, what?

(Objected to.)

Ans. The price varied from the time I commenced to sell them. From $27 to $30 I should think would be the average price.

8. Of what years are you speaking?

(Objected to.)

230 Ans. During the time I have been selling these bitters.

9. Have you ever known of any of these bitters selling as low as $16 or $17 per gross?

(Objected to.)

Ans. I don't remember as I have.

10. Was it or not considered essential to the genuineness of the article that it should be put up at Georgetown, Mass.?

Ans. Yes, sir; I think it was.

11. Was it not necessary that the bottles should be shaped like Exhibit A?

Ans. Yes.

12. Were not these the guides or marks by which the article was in part bought and sold in the trade?

Ans. I should say they were the guides by which the majority of the trade bought and sold.

13. Without these the trade would not buy them as the Georgetown Bitters, would they?

(Objected to.)

Ans. I don't know.

14. You state in your 12th direct that this article is not more frequently called for by the mere words Atwood's Bitters; then those words merely are not a sufficient designation, are they?

Ans. I should say it was. There are Atwood's Quinine Bitters.

15. Are there any other Atwood's Bitters known to you except the two named?

Ans. Yes.

16. Please name them?

Ans. L. F. Atwood's Quinine Tonic Bitters, and I have heard of other kinds, but have not seen them.

17. Now, then, if a person in the course of trade were to ask
231 you for Atwood's Bitters merely, would you not be obliged, in order to learn which kind he wanted, to call for some further description?

(Objected to.)

Ans. In some localities I would and others I would not.

18. Why would you be obliged to ask the purchaser to give a more particular description in some localities than others?

(Objected to.)

Ans. In most localities this is the only bitter known by the name of Atwood's Bitters; in other localities both Atwood's Quinine Tonic Bitters and this are known.

19. Looking at Exhibit A, by what marks, words, symbols, form, and color do you, as a person having knowledge of this article, judge it to be genuine? State all the indications.

Ans. First, the name blown in the bottle; form and shape of the bottle; the bitters are usually this color; no medicine is always the same color; and the general appearance, and the names of the manufacturers.

20. Is it any one of these things by itself, or all of them together, upon which you would form your judgment?

Ans. All of them together.

21. Are you now in any way connected in business with the Manhatton Medicine Co.?

Ans. No.

22. Are not the L. F. Atwood Bitters a well known article in the market?

Ans. In Boston they are; in Chicago, I don't know about.

23. Previous to the sale to the Manhatton Medicine Co., in your ex-

perience, were or not the articles like Exhibit A bought of or contracted for with Carter and Bateman, of Georgetown, Mass.?

Ans. Yes.

232 24. Did you find, in your journeys through the Southern States, that the dealers were generally familiar with the article like Exhibit A?

Ans. This is the kind they generally knew, so far as they knew any.

25. Were the dealers generally acquainted with this article?

Ans. Yes.

26. From your knowledge of that fact, upon what marks, words, &c., did they depend in order to distinguish this class of bitters from others?

Ans. I don't know, only that they asked for Atwood's Jaundice Bitters, or Atwood's Bitters.

27. Are there not certain of the trade in this part of the country who generally purchase Carter's; others, Bateman's; others, the Mystic?

Ans. Yes, except the last; I have no knowledge of the last.

28. Are you familiar, as a dealer in this article, with the label like the one annexed to the deposition of Luther F. Carter, 86th question?

Ans. I am not very familiar with it. I am more familiar with Exhibit A.

29. For how many years has that been the case?

Ans. Ever since I have been in the business, the general style of it.

Chief resumed by Mr. CHASE:

16. Who put up the Quinine Tonic Bitters, referred to by you?

Ans. They are now put up by Gilman Bros., of Boston, and are called L. F. Atwood's Quinine Tonic Bitters.

LOREN B. LORD.

233 *Deposition of John C. Howe.*

Examination of JOHN C. HOWE by Mr. CHASE, for the plaintiff:

1. State your residence, age, and business.

Ans. Boston; age, forty-eight; business, drugs and paints, at 107 Milk st., Boston, of the firm of Howe & French.

2. Were you acquainted with Moses Atwood, formerly of Georgetown, Mass.?

Ans. Yes.

3. What business was he engaged in when you knew him?

Ans. Putting up a preparation known as Atwood's Jaundice Bitters.

4. When was that?

Ans. Between 1850 and 1856.

5. Did you have business dealings with him in respect to his bitters business? If so, what?

Ans. I did. I sold him the materials for making it and the bottles.

6. State, as nearly as you can now, between what years you sold him bottles and materials for his bitters.

Ans. I think between 1850 and 1856.

7. In what quantities did you sell him materials and bottles for his bitters?

Ans. I sold him alcohol by the several barrels at a time, oil of anise by quite a quantity, and a case of aloes at a time, and we sold him ten or twenty cases of glass bottles at a time. A case, I think, contained three gross, may have contained five gross.

8. Describe the kind of bottles which you sold him for his bitters.

Ans. An eight ounce, plain prescription, long, like Exhibit F.

234 Not positive whether we furnished him any like Exhibit A. Moses Atwood had no letters blown in the glass.

9. Did you, or not, deal in Atwood's Bitters when put up by Moses Atwood?

Ans. I presume we did, to some little extent.

10. Do you remember whether the label on Exhibit F is the one used by Moses Atwood on his bitters?

Ans. I am not clear about the label; it looks like it. It is a number of years since I have handled it.

11. Were you, or not, acquainted with Carter & Dodge, of Georgetown, Mass.?

Ans. I knew them very well, indeed.

12. What, if any, business transactions did you have with them in respect to the Atwood's Bitters business?

Ans. Sold them bottles and materials as we sold Moses Atwood previously.

13. During what time and in what quantities?

Ans. Well, should think between 1855 and 1860, along there. They bought very freely. Don't know whether they bought more or less than Atwood.

14. What style of bottle Carter & Dodge with?

Ans. My impression is we sold them fluted or fancy prescription bottle, similar to Exhibit A.

15. Did you deal in said Atwood's Bitters while they were put up by Carter & Dodge?

Ans. No doubt sold more or less of them.

16. You remember the style of label used by Carter & Dodge on the bitters while put up by them?

Ans. The general appearance is the same.

17. Did you have dealings with Carter & Son, and Carter & Sons, while they were putting up Atwood's Bitters?

Ans. Yes.

18. What dealings?

Ans. Sold them materials, and I think more or less glass-ware.

235 19. Have you continued to deal in said Atwood's Bitters up to the present time?

Ans. Yes, we have.

20. Is or not said article a well known and established article in the trade?

(Objected as to form and substance.)

Ans. I should say Atwood's Jaundice Bitters are.

21. What article do you mean by Atwood's Jaundice Bitters?

Ans. I should say the article as originally put up by Moses Atwood.

22. State how the article Exhibit A is generally known and designated in this market.

(Objected to.)

Ans. Atwood's Jaundice Bitters, as I understand it.

23. State whether or not you ever knew [them] to have anything to do with putting up Atwood's Jaundice Bitters.

(Objected to.)

Ans. I never knew or heard of it before.

24. How long an experience have you had in the medicine business?

Ans. Some twenty-five years.

25. Examine Exhibits A and B, plaintiff's and defendants' articles, and state whether or not dealers and consumers, in your opinion, are

likely to be deceived into purchasing defendants' article as and for plaintiff's article.

Ans. I think a majority of buyers would—jobbers and consumers. People go a good deal upon presumption, especially where the difference is not very marked.

26. Do you mean in respect to the difference in the name of the article?

Ans. I mean to say, if I had been in the habit of buying Atwood's Jaundice Bitters, and I had been buying a style of bottle like Exhibit A, and the style of bottle Exhibit B were given me, especially
236 if I were buying of the same parties, I think I should be justified in taking for granted that I was buying the same preparation. It is not an uncommon thing for a party to change his bottle.

27. Compare Exhibit H with A and B, and state whether or not purchasers of plaintiff's article would or would not be more likely to be deceived by Exhibit H than by Exhibit B.

(Objected to.)

Ans. I think they would.

Cross-examination by Mr. CLIFFORD:

X. 1. Does or not the eye readily detect the difference between the external form and appearance of Exhibit F and Exhibit A?

Ans. Yes, especially if their attention was called to it.

X. 2. Does or not the eye detect the difference between the form and external appearance of Exhibit A and B?

Ans. As you call my attention to it, I can perceive a difference very perceptible.

X. 3. Do you not, upon inspection, observe marked differences between the labels of Exhibit H and Exhibit A?

Ans. I should say the general appearance was very much alike. I do notice a marked difference, upon close inspection.

X. 4. From 1850 to 1856, were Moses Atwood's Bitters sold by druggists in the trade, or only peddled out by him, as far as you know?

Ans. I presume the larger part of the sales were made by his individual efforts.

5. Peddled out from carts?

Ans. That is my impression.

6. Did you or not, at the first, at least, understand that you were selling him all his materials?

(Objected to.)

237 Ans. I never knew that we sold him all. I presume we sold him all of certain materials.

7. Do you know what other materials he purchased for his bitters?

Ans. I do not.

8. You sold him the cheapest kind of aloes, did you not?

Ans. We sold him what is called Cape aloes, which is the cheapest grade of green aloes.

9. Was, or not, the bottle like Exhibit F a bottle named or described on the lists?

Ans. It was.

10. Was, or not, the bottle Exhibit A named and known on the lists in your trade as a fancy or fluted prescription bottle of a certain capacity?

Ans. Yes.

11. Do you, or not, remember that the form of bottle like Exhibit A, with the letters blown in the glass, were first used to contain these bitters by Carter & Dodge?

Ans. I have that impression. I don't think Moses Atwood had any private mould.

X. 12. What drugs did you sell Carter & Dodge for their use in the preparation of the bitters?

Ans. I believe we sold them as we did Moses Atwood.

13. In view of other Atwood's Bitters in the market, is the mere term Atwood's Bitters without Moses Atwood, Georgetown, Mass., sufficient to denote this bitters?

Ans. I don't know as I understand the question.

14. Do you know of such an article in the market now as Atwood's Tonic or Atwood's Quinine Bitters?

Ans. I do.

15. Now, what I ask is, knowing that, would the mere term Atwood's Bitters be sufficient to designate which of the two was meant?

Ans. No, it would not. There has been a time when, if I re-
238 ceived an order from a customer, say for one dozen Atwood's Bitters, and nothing more was said, I should unhesitatingly fill the order with what I call Atwood's Jaundice Bitters. To-day, however, were I to receive a verbal order for a dozen Atwood's Bitters, I should say, do you mean Atwood's Jaundice or Atwood's Quinine Bitters; and if the latter, which size?

16. How long has this been the case?

Ans. I can't speak positively, but should say from three to five years. The quinine have rapidly increased the last few years.

17. Supposing Exhibit B were offered you by a party other than the one from whom you had been accustomed to buy the Exhibit A, would you or not, from the external appearance of the two, call them the same thing?

Ans. Dealing with a stranger, I suppose the difference in the label or bottle would raise a question in my mind, and I suppose would with anybody.

18. Would, or not, in your opinion, the same remarks apply to Exhibit H?

Ans. There is a greater general resemblance between H and A than between A and B. But these Atwood's Bitters are put up in bundles of one-half dozen each, I think, or used to be, with a label outside, designating what they are.

19. Of whom did you buy your bitters after 1856?

Ans. Some, I presume, of Carter & Dodge, and I suppose we bought some of M. Carter & Son, and a good many of Dodge, L. H. Bateman, and more latterly of Dorman.

20. Did you know of there being in the market an inferior article put up like Exhibit A, and sold for a reduced price?

(Objected to.)

Ans. I don't remember of any cheaper preparation of Atwood's Bitters. Never heard of it till last Saturday. That was only hearsay.

21. Who spoke to you of it?

(Objected to.)

239 Ans. A person who introduced himself as Mr. Wood, of Portland.

22. Was, or not, the fact well known that these Atwood's Bitters were formerly put up at Georgetown, Mass.?

(Objected to.)

Ans. My impression is they were put up somewhere else first, by Moses Atwood.

Direct resumed:

28. Did you have the mould of the bitters bottle which you supplied Carter & Dodge?

Ans. Well my impression [is] we did, the custom being for the mould to remain with the druggist.

29. Suppose plaintiff's and defendants' bitters were each packed as you say they are accustomed to be, in packages of one-half dozen bottles each, and the case or package marked as you say, Atwood's Bitters or Atwood's Jaundice Bitters, would or not a dealer be as likely to buy one as the other for the plaintiff's article?

Ans. Yes.

30. Suppose a new dealer had seen the plaintiff's article advertised or heard it recommended, and intending to purchase the same for sale, and not being particularly acquainted with the differences between Exhibit A and Exhibit B, would he or not be likely to be deceived into purchasing B for A?

(Objected to.)

Ans. I think he might; I don't see how the buyer could discriminate.

31. How would it be with a consumer?

240 Ans. I should think [the] majority of consumers would take one as quick as the other, without any objection.

Cross resumed:

23. In your 30th answer, you mean, do you not, when the bottles are packed in wrappers or boxes?

Ans. Well, partially so.

24. Referring to the 29th direct, suppose bottles like Exhibit A were packed as they are accustomed to be, in packages of one-half dozen bottles each, and the bottles filled with molasses and water, and marked Atwood's Bitters or Atwood's Jaundice Bitters on the cases or packages, would not a dealer be as likely to buy such a package as he would one that contained a mixture of aloes, alcohol, and anise, if the same were offered to him as Atwood's Bitters', provided no inspection is made by him of the contents of the packages?

(Objected to.)

Ans. I should say yes if he were dealing with responsible parties, like Cutler & Bros., Weeks & Potter, Carter & Wiley.

Direct resumed:

32. Do you think that such an inexperienced dealer would be as likely to return to the seller the defendants' article as the molasses and water?

Ans. I presume the defendants' article is as good as any other. I know nothing about it.

JOHN C. HOWE.

241 *Deposition of Charles E. Parker.*

Examination of CHARLES E. PARKER by Mr. CHASE:

1. State your age, residence, occupation.

Ans. Thirty-five; West Newton; wholesale druggist.

2. Your place of business and name of your firm.

Ans. Boston; Cutler Bros. & Co., 89 Broad street.

3. Are your acquainted with the article of medicine called Atwood's Bitters or Atwood's Jaundice Bitters?

Ans. I am.

4. How long have been acquainted with it?

Ans. About fifteen years; probably more.

5. In what way?

Ans. The name was familiar as clerk, in the first place, and then as salesman.

6. Are you a member of the firm of Cutler Bros. & Co.? If so, how?

Ans. I am, and have been over six years.

7. How long have you been connected with the firm of Cutler Bros. & Co. as a member and clerk?

Ans. Have been connected with them and their predecessors, Reed, Cutler & Co., rising fifteen years.

8. Have Cutler Bros. & Co. and Reed, Cutler & Co. sold Atwood's Bitters during all the time you have been connected with them?

Ans. They have.

9. Of whom did they buy their supplies of Atwood's Bitters?

Ans. From L. H. Bateman, M. Carter & Son, Georgetown, and occasionally from some party in Mystic, Conn.

10. Of whom have Cutler & Bros. [purchased] their Atwood's Bitters for the year past?

Ans. I should say of the same parties; can't say definitely without reference to the books. I know we have bought of J. F. Henry, Curran & Co.

242 11. How is the article known and called in the trade?

Ans. The general designation is Atwood's Jaundice Bitters; sometimes simply Atwood's Bitters.

12. In what style of bottle and label have the Atwood's Bitters referred to by you been put up?

Ans. Have been put up like Exhibit A.

13. Is or not said article well known in the trade?

(Objected to.)

Ans. It is.

14. Look at Exhibit A, plaintiff's article (and Exhibit B), defendants' article, and state whether in your opinion, persons who were not particularly acquainted with said two articles would be likely to be deceived into purchasing the defendants' article for the plaintiff's.

Ans. I think individuals would. Don't think druggists would continue to be deceived; don't think druggists who knew their business would. If an individual should go into an apothecary store, make an inquiry for Atwood's Jaundice Bitters, never having seen the article, have this article handed him, he would be likely to accept it as genuine.

15. Are you acquainted with Nathan Wood & Son, of Portland, Maine?

Ans. I have a business acquaintance, and slight personal.

16. Did you have a conversation with Nathan Wood in respect to Atwood's Bitters in the style of Exhibit H? If so, state when, as near as you can, and where it was, and what it was.

(Objected to.)

Ans. I did, some time in 1875, as to a suit which he had been having with certain parties as to Atwood's Bitters, in our store. At that time he shew me either a mould or bottle which he had been having made, and which I understood him to say he was entitled to use by the recent decision in the suit. That was the substance of the conversation. The mould or bottle was similar to Exhibit H, without
243 a label.

17. Please examine your books and state, as nearly as you can, the time when this conversation took place.

(The original contains no answer to int. 17.—A. H. D., clerk.)

18. State what is your opinion in respect to purchasers of Atwood's Bitters being likely to be deceived into purchasing Exhibit H, for plaintiff's article Exhibit A, or otherwise.

(Objected to.)

Ans. I think, as in the previous instance, an inexperienced person would be misled, if anything, more readily.

19. Do you mean that an inexperienced person would be more likely to be deceived into purchasing Exhibit H, as and for Exhibit A, than into purchasing Exhibit B, as and for Exhibit H?

(Objected as to form.)

Ans. Certainly I do.)

20. Would or not a person of but little experience be very much more likely to be deceived by Exhibit H than Exhibit B?

(Objected to.)

Ans. They would.

Cross-examination by Mr. CLIFFORD.

1. Do or not inexperienced purchasers of goods in your business, have to rely upon the good faith of the seller, as to the quality of the article which they buy of them?

Ans. In patent medicines, I should say no, as the retail druggist cannot guarantee the quality of goods which he does not make or compound himself; he may or may not, as far as his ability goes, guarantee the genuineness of an article, but not the quality.

244 2. The responsibility then, of the impurity or worthlessness of an article rests with the manufacturer?

Ans. It does.

3. Then if a manufacturer puts upon the market, if I understand you, a worthless or inferior article under the same external appearance as Exhibit A, the dealers have no means of protecting the public from the imposition?

Ans. They certainly have, by refusing to sell the goods if they wish.

4. But if they do not know how they are compounded, how can they have any knowledge whether the goods are worthless or not?

(Objected to.)

Ans. Their only knowledge is to be gained from the reputation the goods bear in the market.

5. Well, now, suppose the manufacturer to put up a worthless article with the external appearance of Exhibit A in all respects, and put it out as Atwood's Bitters, would not the trade and purchasers, not knowing how the liquid was compounded, be alike imposed upon?

(Objected as to form and substance.)

Ans. Not at all.

6. Explain why not, if they bought it?

Ans. As it is customary in business to buy and sell patent medicines on their presumed merits, as set forth in their labels and advertisements, so it is customary to buy such goods of the proprietors without knowledge of the formula by which they are compounded, which knowledge is the proprietor's own private property.

7. Suppose M. Carter & Son, of whom you were purchasing, had put up a worthless article, in external appearance like Exhibit A, label, bottle, words, &c., and sold it to you, what could have prevented you and other dealers and the public from being thereby imposed upon, according to the usage of the trade?

245 (Objected to.)

Ans. If M. Carter & Sons had sold to us as represented above, stating to us in their advertisements, labels, &c., that the goods had the medicinal properties set forth in the labels, advertisements, &c., and we had bought them on the strength of such representations, we should have been imposed on by them.

8. Do you judge Exhibit A to be genuine?

Ans. I should so consider it.

9. What leads you to that conclusion?

Ans. The apparent distinguishing features of the patent medicine, consisting of the appearance of the medicine, style of the bottle, and style of the label.

10. And if all these appearances were similar but the medicine itself wholly worthless, but you ignorant of this last fact, your judgment would still be the same, would it not?

Ans. If bought of responsible parties, it would be the same.

11. Is or not your knowledge as a druggist only derived from the reputation which an article like Exhibit A has in the market.

Ans. My knowledge of the article is gained from the reputation the article has had in the market, and also a business acquaintance with the parties who have manufactured the goods in times past.

12. Suppose you had in your store the four articles now shown you, Exhibits A, B, H, and I, and I, a person wholly inexperienced with this medicine, should come to you to buy a bottle of Atwood's Bitters, desiring to obtain one like Exhibit A, but not knowing the difference between the several kinds myself, should I not have to depend upon your good faith, who know the difference, to get the one I wanted?

Ans. Certainly you would, as you would in any article of med-

246 icine. When an inquiry is made by an inexperienced person for Atwood's Bitters, it is customary, unless they ask for Atwood's Jaundice Bitters, to inquire whether they want Atwood's Jaundice Bitters or Atwood's Quinine Tonic Bitters, which are known in the trade as two entirely distinct articles.

13. But if I were familiar with the difference between the four Exhibits, as you are, my dependence would be upon my own judgment would it not? And is not this the same with other medicines?

Ans. Any man's dependence in buying any class of goods is upon his judgment, as a general thing; but in this case, if I do my business properly as salesman, I should ask the question before mentioned. I say yes to the question.

14. If I were to come into your store and ask for Atwood's Jaundice Bitters, and was not particularly acquainted with the two articles, A and B, you think, if you were disposed, do you not, that you could sell me B and make me think it was A?

Ans. I can't answer that question. If a gentleman should come into my store and ask for Atwood's Bitters, and I show him A and B, I could not make him understand that they were the same. If I did not show him the samples, he being inexperienced, might have Exhibit B imposed upon him in place of Exhibit A, if I were so inclined.

15. Suppose there are three qualities of gum arabic, and I an inexperienced purchaser, and you, without showing me but one sample, the lowest grade, offer me that as and for the price of the highest, Could not this be done and the article sold me in precisely the same way as you say you could sell me Exhibit B for Exhibit A?

Ans. No.

16. Why not?

Ans. Any purchaser of ordinary ability, buying an article like gum arabic, would probably know and readily detect the difference
247 between the best and the poorest; but the purchaser of the bitters would not so readily detect the difference between the two, for the reason that he might be led to suppose that the manufacturer of the bitters had made a change in his style.

17. You do not think, do you, that if you showed me, an inexperienced person in this matter, Exhibits A and B at the same time, that you could sell me one as and for the same thing as the other, do you?

Ans. If you ask me as an inexperienced person for Atwood's Jaundice Bitters, and I show you A and B, if I wished to do so, I could sell you one as quickly as the other.

18. Then you do not think, do you, as stated in the 14th answer, that "If a gentleman should come into my store and ask for Atwood's Bitters, and I show him A and B, I could not make him understand that they were the same"?

Ans. I say the same as in answer to the 14th question.

19. Now, which do you mean; if you were to show an inexperienced person in this bitter, Exhibits A and B at the same time, that you could or could not make him believe they were the same?

Ans. I could make him believe that either were genuine.

20. Now, could you not do the same thing with an ignorant person, with different grades of a drug, when you show him only one grade and tell him that is the best?

(Objected to.)

Ans. As a general thing, no.

21. In your purchases of Atwood's Bitters of Carter & Son, of Georgetown, have the bitters [been] like Exhibit A?

Ans. I should say they had.

22. Did you ever purchase any with a label like that annexed to Luther F. Carter's 86th ans?

Ans. I presume we have, but don't know.

23. Do you know whether you have always paid a uniform price per gross, and, if not, what were the different prices?

248 Ans. We have bought of Carter at two prices, which were about $30 for one style, and about $18 for the other, per gross.

24. Have you ever had any difficulty with the cheaper bitters from their becoming spoiled or being returned to you, or anything of that nature?

Ans. Not to my knowledge. Nothing more than is liable with all patent medicines.

25. How many times do you think you have had the cheaper bitters returned to you, if at all?

(Objected to.)

Ans. I don't remember of any time.

26. What trouble, if any, have you ever had with them?

Ans. I know of none.

27. For how many years were the cheaper bitters in the market?

(Objected to.)

Ans. I don't know.

28. Were they or not understood in the trade to be an inferior article?

Ans. I should say not.

29. Were they understood to be just as good as the other?

Ans. I should say they were.

30. Mr. Wood told you, did he not, that under the decision of the court, he had a right to use a round bottle like Exhibit H?

Ans. I can't answer that question directly. As I remember, he said that the decision of the court would entitle him to use a round bottle, whether like that I can't say, showing me at the time either a mould of or a specimen of the bottle he might use, similar to H; whether just like it I can't state.

249 31. Do you remember whether the mould or bottle which he showed you was of the exact size and form of Exhibit H.

Ans. I do not.

32. Do you distinctly remember that it was anything more than a smooth round bottle, about the size of H or B?

Ans. I do remember that it was a bottle about the size of Exhibit A, which we compared at the time.

33. What price did the bitters you bought of Carter sell for per bottle?

Ans. I can't state, as we don't sell at retail.

Direct resumed by Mr. CHASE:

21. Did you or not, consider the $18 bitters bought of Carter equally genuine with the $30 article bought of him.

Ans. We did.

CHAS. E. PARKER.

Contract of Moses Atwood and Moses Carter, dated Jan. 1, 1848.

Articles of agreement made and entered into this first day of January, A. D. 1848, by and between Moses Atwood, of Georgetown, county of Essex, and State of Massachusetts, vegetable medicine manufacturer, on the one part, and Moses Carter, of said Georgetown, county of Essex, and State of Massachusetts, merchants, on the other, witnesseth:

That said Atwood, in consideration of fourteen hundred forty-six dollars and eighty cents, paid said Atwood by said Carter, the said Atwood doth sell and convey unto said Carter all the bills against local agents, and all the right to sell Atwood's Jaundice Bitters,

250 Strengthening Plasters, Canker Drops, Rheumatic Elixer, and Dysentery Drops in part of the following States, viz: Massachusetts, Rhode Island, Connecticut, and New York, commencing at Rowley, Mass., Topsfield, Danvers, Lynnfield, South Reading, Stoneham, South Woburn, Medford, Charlestown, Newton, Dedham, Walpole, Rentham, to the corner of Rhode Island, with the exceptance of Salem and Marblehead, with all the towns lying south in Massachussetts line, commencing in Cumberland, R. I., North Providence, on a line to Gloucester, North Society, in Ct., with all the towns lying south in Rhode Island line, commencing at North Society, Ct., Charlton, Mansfield, Bolton, Weathersfield, Bristol, Plymouth, Watertown, Milford, Sherman, to Patterson, New York, with all the towns lying south in Connecticut line, commencing in New York, at Patterson, County of Putnam, Weschester, Rockland, Orange, Sullivan, Rolster, Delaware, Broome, Chenango, Courtland, Tioga, Chemung, Tompkins, Yates, Stuben, Allagana, Wyoming, Erie, Cattaraugus, Chautauque, with the city of New York, and in no other place without further permission. The said Atwood doth agree not to sell, or cause to be sold the said medicine in the above mentioned places, so long as the said Carter supplies the said mentioned places with the said medicine. The said Atwood agrees to make [for the space of ten years, if said Atwood

should decease within that time] said bitters for seventeen dollars per barrel, the barrels to contain forty gallons each, to be delivered in the State that they are made; the other articles of medicine at the following prices, viz: Canker Drops at two dollars per gallon, Rheumatic Elixir at one dollar and fifty cents per gallon, Dysentery Drops at one dollar and fifty cents per gallon, and Strengthening Plasters at six cents per box. The said Atwood is to have a reasonable time to manufacture the above medicine after being ordered. The said Carter agrees to advance three-quarters in cash, or other
251 ways, as we may agree when the above medicine is ordered. The said medicine is to be delivered in Georgetown. The said Carter doth agree not to sell, or cause to be sold, the said medicine on any other ground than the above mentioned.

MOSES ATWOOD. [L. S.]
MOSES CARTER. [L. S.]

MEM.—The above in brackets was found interlined in lead pencil in the original.

A. H. D., *Clerk.*

Articles of co-partnership of Benj. S. Dodge and Moses Carter, dated Feb. 2, 1852.

This indenture of two [three] parts made this second day of February, in the year of our Lord one thousand eight hundred and fifty two, by and between Moses Carter and Benj. S. Dodge, of [C. L. Carter] Georgetown, in the county of Essex, and commonwealth of Massachusetts, traders, witnesseth: That the parties aforesaid have formed and do hereby form a copartnership in the business of making and vending Atwood's Vegetable Medicines and Essences, and do hereby covenant and agree to be governed by the following articles, namely:

First. The said business shall be carried on under the name, style, and firm of Carter, Dodge & Co., in said Georgetown.

Second. Each of the said parties shall pay for one-half [third] the stock used in the business, and for one-half [third] the labor of manufacturing and putting up the medicines, and of the sales thereof.

Third. The books of the said copartnership shall be fairly kept, and at all times open to the inspection and free use of either party.

252 Fourth. All purchasers of goods or stocks exceeding the value of one hundred dollars shall be the subject of consultation and mutual agreement by the partners.

Fifth. Neither party shall withdraw from the business of the concern more than his share of the profits which may have accrued.

Sixth. If either party shall intentionally violate either of the articles of this agreement, the other party may immediately give public notice of the dissolution of copartnership, but otherwise it shall continue five years from date thereof.

Seventh. The division of the profits or losses in the business shall be equal.

Eighth. In case of disagreement between the parties hereto, at the close of said partnership, all matters of difference shall be submitted to the arbitrator, and award of arbitrators mutually chosen and agreed upon; and, if the parties cannot mutually agree upon arbitrators, they shall each name two persons, and the award of the arbitrators mutually chosen, or of any three of the four persons nominated as above by the parties, respectively, shall be a final decision of all controversies

relating to partnerships, and if either party refuse to join in this proceeding the other may proceed ex parte.

Ninth. In testimony of our agreement to each of the aforesaid articles we hereunto set our hands and seals.

BENJ. S. DODGE.
MOSES CARTER.

Attest:
ZERA RUSSELL.

Contract to settle some doubts and supply some omissions in agreement of Dec. 25, 1851, dated Sept. 29, 1852.

To settle some doubts and supply some omissions in an agree-
253 ment in two parts dated December 25, A. D. 1851, entered into on one part by Atwood & Bingham, and on the other by Moses Carter and Benj. S. Dodge, all of Georgetown, in the county and commonwealth of Massachusstts: It is agreed this twenty-ninth day of September, A. D. 1852, by Moses Atwood aforesaid, on the one part, and said Carter & Dodge on the other part (this instrument being in two parts) as follows, to wit:

Said Carter & Dodge are to retain the bills conveyed to them in the aforenamed agreement. Said Carter & Dodge are to have the right to use said Atwood's name on the labels and circulars, and to manufacture and sell the following medicines, viz: Atwood's Vegetable Jaundice Bitters, Atwood's Compound Extract of Sarsaparilla, Atwood's Dysentery Drops, Atwood's Canker Drops, Atwood's Rheumatic and Spinal Elixir and Strengthening Plasters, on the ground hereinafter described, and not to sell, by themselves or their agents, in any other portion of the world, or sell to others to sell, except on the ground hereinafter described, or manufacture, or be interested in the manufacture, of said medicines, except for sale on their ground, as hereinafter defined.

The ground on which said Carter & Dodge are to sell and manufacture for sale, as aforesaid, the said medicines, is agreed to be the following, viz: The State of Massachusetts, except the places of Lowell, Dracut, Methuen, Lawrence, North Parish of Andover, in the neighborhood of Sutton Mills, Bradford, Haverhill, Amesbury, all of Salisbury except the lower village, and said Atwood's right to sell at his place in Georgetown, Rhode Island, Connecticut, New York, except the counties of Warren, Essex, Clinton, Franklin, St. Lawrence, Hamilton, Fulton, and that part of Herkimer lying north of the Erie Canal, New Jersey, Pennsylvania, Delaware, Maryland, the towns of Seabrook, Hampton, Rye, Greenland, Portsmouth, Salmon Falls, and Wakefield,
in the State of New Hampshire, the towns of Kittery, South Ber-
254 wick and Lebanon, in the State of Maine, and the counties of Bennington, Windham, Windsor, Rutland, and Addison, except the towns of Granville, Lincoln, Starksborough, Monckton and Fereilsburg, in the State of Vermont.

And it is agreed that Andrew Smith has the right to sell said medicines in the towns of Effingham, Eaton, Ossipee, Wolfborough, Yarmouth, and Sandwich, in New Hampshire, and all towns north of the last named in New Hampshire ever included in said Carter & Dodge's ground, and that said Atwood has the right to supply said Smith with said medicines. And the said Atwood agrees not to sell, or cause to be sold, or manufacture, or cause to be manufactured, any of the above-described medicines, to be sold in said Carter & Dodge's ground above

described. It is agreed that said Atwood has the right to sell all other medicines or preparations made by him, except the aforedescribed, on said Carter & Dodge's ground.

And the said Carter & Dodge agree not to sell, or manufacture for sale, by themselves or others, any of the above-described medicines, at wholesale, in the city of Boston. And the said Carter & Dodge agree to supply Amos P. Albee, A. C. French, and Daniel French, with the aforesaid medicines, by the quantity, to sell on said Carter & Dodge's ground at the following prices, viz: Jaundice Bitters, twenty-nine dollars for forty gallons, cash, delivered in Georgetown, Mass.; Dysentery Drops, at two dollars per gallon; Canker Drops, at two dollars and a half per gallon; Rheumatic or Spinal Elixir, two dollars a gallon; Compound Extract of Sarsaparilla, twenty-five dollars per forty gallons, cash; and Strengthening Plasters, eight cents per box, and labels for the same included. And the said Carter & Dodge are to credit said Albee until he shall pay said Atwood and Bingham what he owes them for said medicines. And for the full performance of all and every of the aforesaid agreements, each of the said parties to these
255 presents does hereby bind himself, his heirs, executors, and administrators in the penal sum of two thousand dollars.

In witness whereof the parties have hereunto set their hands and seals, this twenty-ninth day of September, A. D. 1852.

MOSES ATWOOD.
MOSES CARTER.
BENJAMIN S. DODGE.

Signed, sealed, and delivered in presence of—
J. P. JONES.

SEPT. 29, 1852.

ESSEX, *ss:*

Then personally appeared the above-named Atwood, Carter & Dodge, and acknowledged the foregoing instrument to be their free act and deed.

Before me.

J. P. JONES,
Jus. Peace.

PLAINTIFF'S EXHIBIT G.

This is to certify that Levi F. Atwood, of Fairfield, in the State of Maine, in the county of Somerset, in consideration of one dollar to me paid by Moses Carter and Benjamin S. Dodge, both of Georgetown, in the county of Essex and commonwealth of Massachusetts, do hereby agree with said Carter & Dodge not to reveal or communicate in any way to any person or persons the knowledge I have of the manner of manufacturing Moses Atwood's Vegetable Physical Jaundice Bitters, Dysentery Drops, Canker Drops, Rheumatic or Spinal Elixer, Compound Extract of Sarsaparilla, and Comfrey.

L. F. ATWOOD.

KENDALL'S MILLS, FAIRFIELD, ME., *Feb.* 22, 1854.

256 *Articles of copartnership of Moses Carter, Benj. S. Dodge, and Charles L. Carter, dated March* 2, 1855.

This indenture of three parts, made this second day of March, in the year of our Lord one thousand eight hundred and fifty-five, by and be-

tween Moses Carter and Charles L. Carter, of Georgetown, and B. S. Dodge, of Rowley, in the county of Essex and Commonwealth of Massachusetts, traders, witnesseth, that the parties aforesaid have formed, and do hereby form, a copartnership in the business of making and vending Atwood's medicines and essences, and do hereby covenant and agree to be governed by the following articles, namely:

First. The said business shall be carried on under the name, style, and firm of Carter, Dodge & Co., in said Georgetown.

Second. Each of the said parties shall pay for one-third of the stock used in the business, and for one-third of the labor of manufacturing and putting up the medicines, essences, and of the sales thereof.

Third. The books of the said copartnership shall be fairly kept, and at all times open to inspection and free use of either party.

Fourth. All purchases of goods or stock exceeding the value of one hundred dollars shall be the subject of consultation and mutual agreement by the partners.

Fifth. Neither party shall withdraw from the business of the concern more than his share of the profits which may have accrued.

Sixth. If either party shall intentionally violate either of the articles of this agreement, the other party may immediately give public notice of the dissolution of copartnership, but otherwise it shall continue five years from the date thereof.

257 Seventh. The division of the profits or losses in the business shall be equal.

Eighth. In case of disagreement between the parties hereto, at the close of said partnership all matters of difference shall be submitted to the arbitrator, and award of arbitrat*ies* mutually chosen and agreed upon; and if the parties cannot mutually be agreed upon arbitrators, they shall each name two persons and the award of the arbitrators mutually chosen or of any five of the six persons nominated as above by the parties, respectively, shall be a final decision of all controversies relating to partnership, and if either party refuse to join in this proceeding the other may proceed ex parte.

Ninth. And in testimony of our agreement to each of the aforesaid articles we hereunto set our hands and seals.

MOSES CARTER.
BENJ. S. DODGE.
CHAS. L. CARTER.

In presence of—
WM. BOYNTON,
ROBERT BAYES.

Agreement of bill of sale from Benj. S. Dodge to Wm. B. Dorman, dated Sept. 4, 1867.

[5 c. revenue.]

Memorandum of an agreement made this fourth day of September, A. D. 1867, between Benjamin S. Dodge, of Rowley, in the county of Essex and commonwealth of Massachusetts, and William B. Dorman, of Georgetown, in said county.

First. The said Dodge hereby assigns and conveys to said Dorman the right to manufacture and sell Atwood's [Bitters] Medicines, so called, for the term of five years from the date aforesaid, and to use the trade-marks he has heretofore used in the sale of said [bitters[medicines.

258 Second. The said Dorman agrees to give and deliver to said Dodge one-twelfth of all the Atwood's [Bitters] Medicines he shall manufacture during said term, or pay said Dodge the value of one-twelfth in money.

Third. It is agreed that said Dodge may at any time become jointly interested with said Dorman in the manufacture and sale of said [bitters] medicines, by furnishing one-half of the capital; and in such a case each shall have an equal share of the profits and bear an equal part of the losses.

Fourth. If the said Dorman before the expiration of said term shall wish to cease to manufacture and sell said [bitters] medicines, he shall have that privilege on giving said Dodge notice of the same, and then all rights hereby conveyed shall revert to said Dodge.

Fifth. During the continuance of said term said Dodge shall have no right to manufacture said [bitters] medicines, unless a notice from said Dorman that he has ceased to manufacture them be received by said Dodge.

B. S. DODGE, *Agent.*
W. B. DORMAN.

Executed and delivered in the presence of—
CAROLINE L. DODGE.

[5 c. revenue certificate.]

Affidavit of Moses Atwood.

NEW SHARON, MAHASKA, IOWA, *February* 15, 1875.

Know all men whom*e* these presences may come that I, Moses Atwood, of the town of New Sharon, Mahaska Co., Iowa, being the identical Moses Atwood who form*a*ly, in the year 1840, lived in the town of Georgetown, Essex County, Mass., prior to that time I did invent and make a certain kind of medicine by the name of Atwood's

259 Vegetable Physical Jaundice Bitters, and I done a large business in manufacturing said medicines and selling the same from 1840 until the year 1855 when said Moses Atwood removed to the State of Iowa where he has ever since resided. I have before me this morning a circular of one L. H. Bateman purporting to have the *w*right to manufacture and sell the said above named bitters, and states that when Moses Atwood in 1855 left the town of Georgetown, Mass., that said Atwood lef' with the said L. H. Bateman the original recipe for the manufacture of said bitters.

I hereby testify that said circular is a libel and a fraud, intentional'y gotten up by the said L. H. Bateman for the purpose of defrauding the *w*rightful owner M. Carter & Son, form*a*rly Carter, Dodge & Co. and M. Carter & Sons, and for the purpose of putting a spurious artic*k*l' of medicine on the public, receiving the public's money by false pretences and to cast a slander upon the said Moses Atwood.

I also certify that I, Moses Atwood, did sell all my *w*righ', interest, and claim in and to my invention in the said Atwood Veg*i*table Physical Jaundice Bitters to Carter, Dodge & Co., of Georgetown, Essex County, Mass., with the *w*right to manufacture and sell and to use my name in any way to assist them in the lawful use of the bitters as they may see proper for their own benefit and use, and that I did give to the said Carter, Dodge & Co. the original recipe for said bitters in the year 1852, for a valuable consideration in full paid to me by Carter,

Dodge & Co., in the year 1855, all the territory east and south of the States of Illinois and Wisconsent.

And that I never have given or sold or granted to any other parties any recipe for the said bitters to use my name in any way on the above described ter'itory, except that I did sell to my father, Levi Atwood, and Levi F. Atwood, his son, the wright to manufactur' the said
260 bitters in a part of New Hampshire and Main' and to use their own name on their labills.

MOSES ATWOOD.

Sworn to and subscribed by Moses Atwood in my presence, this 15th day of February, 1875, in the town of Sharon, Mahaska County, Iowa.

JAMES F. COOK,
Notary Public.

Conveyance from Luther F. Carter to Manhattan Medicine Co., dated April 1, 1875.

Know all men by these presents that I, Luther F. Carter, of Georgetown, in the county of Essex and State of Massachusetts, for and in consideration of the sum of three thousand dollars, to me in hand well and truly paid at or before the delivery of these presents, and other good and valuable considerations, the receipt whereof is hereby acknowledged, from the Manhattan Medicine Company, a corporation duly organized under the laws of the State of New York, present office of said company No. 9 College Place, city, county, and State of New York, do hereby and by these presents remise, release, sell, convey, and forever quit-claim unto the said Manhattan Medicine Company, all my right, title, claim, and interest in and to all and singular the trade-mark, recipes, good-will, and proprietorship of and for the well-known medicines, "Carter's Atwood's Vegetable Physical Jaundice Bitters," as devised to me jointly with Moses Frank Carter, under and by virtue of the will of my father the late Moses Carter, said will having been duly probated in the probate court for said county of Essex, with all the bottle-moulds, plates, cuts, and label designs as per samples
261 hereto annexed; hereby granting unto the said Manhattan Medicine Company the full, free, and unrestricted right to make and merchandise the same, and to use the name "M. Carter & Son" (successors to Moses Atwood), Georgetown, Mass., and the fac-simile signature or signatures as now used in and upon the said labels, advertisements, and wrappers of the aforesaid medicine, also the bottle-mould with the name blown in the glass, "Atwood's Jaundice Bitters, M. Carter & Son, Georgetown, Mass.," as now used in or upon (a duodecahedron) a bottle with twelve square sides; meaning hereby to convey all the rights claims, and equities purchased of Moses Atwood, formerly of said Georgetown, by Carter & Dodge and Carter, Dodge & Co. for a valuable consideration.

To have and to hold the said granted and bargained rights, interests, and property, unto the said Manhattan Medicine Company, their successors, administrators, and assigns, to their only proper use, benefit, and behoof forever.

And I, the said Luther F. Carter, for myself, my heirs, executors, administrators, and assigns, do hereby covenant with the said Manhattan Medicine Company, that I am the lawful owner of the rights, interests, and property herein conveyed, under and by virtue of the will aforesaid, and by conveyance from the aforesaid Moses Frank Carter;

that said rights, interest, and property, are free from all incumbrances made, suffered, or allowed by or through me, and that I have good right and lawful authority to sell and convey the same to the grantees, their successors and assigns forever.

And I, the said Luther F. Carter, for myself, my heirs, executors, and assigns, do covenant with the said Manhattan Medicine Company, their successors and assigns, that I will not manufacture or sell, directly or indirectly, any medicine of similar character, name, or appearance as "Carter's Atwood's Physical Jaundice Bitters," or use the
262 name "Atwood," or "Moses Atwood," in or upon any bottle or label or bottle-mould, or use the twelve-square bottle, as now used, or the name "M. Carter & Son," or any advertisement or label or bottle, in any connection with any medicine or remedy whatever that may be used for the same purpose as the Carter-Atwood Physical Jaundice Bitters, or that may conflict with the same or be any imitation thereof.

Meaning hereby to convey all the rights and interests in all of Atwood's Medicines, of every name and kind, as purchased of Moses Atwood by Carter & Dodge and Carter, Dodge & Co., including, also, the so-called "Moses Atwood's Vegetable Physical Jaundice Bitters."

And I, the said Luther F. Carter, for myself, my heirs, executors, administrators and assigns, do hereby covenant and agree that I will, and my heirs, executors, administrators, and assigns shall, warrant and defend all and singular rights, interests and property herein conveyed to said Manhattan Medicine Company, their successors and assigns, against the lawful claims and demands of all persons claiming by, through, or under me, but against none other.

In witness whereof, I, the said Luther F. Carter, have hereunto set my hand and seal, this first day of April, A. D. eighteen hundred and seventy-five.

LUTHER F. CARTER. [L. S.]

Executed in presence of—
ORLANDO B. TENNEY.

Certificate as to birth of Moses F. Atwood.

Moses Francis Atwood, child of Moses Atwood, born March 28, 1839, at Hampstead, N. H.

* * * * * * *

I certify that the above is a true copy from the record of births of the town of Georgetown.

Attest:

F. M. EDGELL, *Town Clerk.*

GEORGETOWN, MASS., *April* 3, 1876.

263 I hereby certify that the within is a full, true and correct copy of an original certificate and exhibit put in evidence by the plaintiff in the taking of testimony in the Manhattan Medicine Company v. Nathan Wood et al., U. S. circuit court district Maine.

PHILO CHASE, *Counsel.*

EVIDENCE FOR RESPONDENTS.

Circuit court of the United States, district of Maine. In equity.

MANHATTAN MEDICINE COMPANY,
vs.
NATHAN WOOD, ET AL.

Examination of witnesses for defendants before George E. Bird, special examiner, under the 67th rule, as amended.

APRIL 18, 1876.

Deposition of John T. Wood.

Deposition of JOHN T. WOOD, who, being duly sworn, deposes and says as follows, in answer to interrogatories proposed by W. H. CLIFFORD, Esq., counsel for respondents:

1. Please state your name, age, residence, and occupation.

Ans. John T. Wood, of the firm of Nathan Wood & Son, dealers in medicine; age is thirty-two; residence, Portland.

2. How long have you been in business with Nathan Wood?

264 Ans. Since 1871. I have been with him as a partner and in the store since the last of 1862.

3. Do you remember of a call at your store of Eli B. Johnson? If so, when was it made?

Ans. I do. It was about the middle of February, 1875; the middle or last of February.

4. If he made more than one call, state what was the object of his first visit.

(Objected to.)

Ans. He made two calls. He said his object was to get all the manufacturers of Atwood's Jaundice Bitters to enter the Manhattan Medicine Company, and wished us to go in with the rest; putting in our right to the Atwood's Bitters at three thousand dollars, and they would issue stock to us to that amount.

5. State, as near as you can remember, the conversation upon this subject of your firm's going into the Manhattan Company.

(Objected to.)

Ans. After he made known his business, we inquired what his object was. He said that it would make the price of this Atwood's Bitters uniform, and the probable price would be twenty-seven dollars, and he thought each proprietor would make more money out of it than if there was competition, so much competition as there had been in the business for the last six or seven years. He gave names of parties intending to enter the company. There were two Thompsons manufacturing eye-water, who were going in. He said he had the refusal of Carter, of Georgetown, of his right to the bitters at six thousand dollars, and Bateman was going into the company, and some others—I don't remember their names. We told him to go and see Mr. Hay, Mr. H. H. Hay of this city, and if he entered probably we would. He went up to Hay's. This was near dinner-time. After we returned from

265 dinner, we found him there at the store. We asked him how he made out. He, Johnson, said he could do nothing with him. He asked what price we set on our right. We told him we understood Mr. Hay valued his at from eight to ten thousand dollars, and we thought ours was worth as much. He said he would give us three

thousand dollars in stock, as before. Upon this and some other conversation, he takes up one of the eight-square bottles, I think it is, and says, you know you haven't a right to this label (turning the bottle label side up). Father says, the different manufacturers are all using this same label. And he said, I think, that the bottle we had no right to. My father said he thought he had a right to any bottle he chose to use.

6. What was said by Johnson about taking the bottle with him, if anything?

Ans. He took a bottle up—an eight-square—and tossing it in his hand, said he should like that bottle. We told him he could take it. He said, "Well, I will pay for it." We told him to never mind for the pay, we shouldn't charge him anything. But he insisted upon paying for it, and threw down twenty-five cents. I think that was the amount.

7. Were or not that kind of bottles kept for sale by you for Atwood's Bitters?

Ans. They were up to that time.

8. How many were there in the store at the time Johnson called?

Ans. Six dozen and a half. We sold none after that visit.

9. Where was the bottle which Johnson thus obtained?

Ans. It was sitting on a small desk in the counting-room.

10. How long after did he visit you a second time?

Ans. The second visit was the 31st of March, 1875—the March following.

266 11. State briefly what took place then, if anything, relative to the words in the glass of the bottle, and give the conversation thereupon.

Ans. It might have been the first time that he said that the lettering on the back of the bottle is a deception, and that you are making these bitters in Portland when you have a bottle having blown in the glass the letters Georgetown, Mass. We told [him] that if there was a deception there we would abandon that wording and use some other—get up another mould with something different. He asked what the mould cost. We told him perhaps a new mould would cost twenty dollars. He says, "I will give you twenty dollars if you will give me an order for the mould." We refused to give him any order. He then asked in whose hands the mould was then in. We did not tell him in whose hands.

12. Did you or not agree with him to sell him the mould?

Ans. When he went out of the store my father told him we would think the thing all over, but there was no sale made whatever.

13. Since Johnson's visit at your store have you or not held any of your bitters for sale in the eight-sided or twelve-sided bottle, with those words in the glass?

Ans. No; we have not. The second time he came here I said to him, "Suppose we put on the top of our label 'M. F.,' and at the bottom 'Moses F. Atwood's' signature, and on the glass his name or ours;" I said, "What then?" He said, "I would sue you to-morrow."

14. At the time you became acquainted with the business, how many kinds of these bitters (I refer to the style of bottle and label, persons by whom and places where manufactured) were there in general sale in the market?

(Objected to.)

Ans. Seven kinds, I think.

267 15. To what year do you refer as the commencement of your acquaintance with the business?

Ans. About 1869 commenced my acquaintance with the different kinds of this medicine.

16. How many different forms of bottles were and have since been used?

(Objected to.)

Ans. I have known of three different forms.

17. How many different kinds of labels?

(Objected to.)

Ans. All the labels I have seen have been about the same. There was a difference in the shape. There was a label for panel bottle; but reading on all was, I think, about the same.

18. State what differences, if any, there were in any of the words upon the labels?

(Objected to.)

Ans. Those put up by Carter had Carter's name printed across in red ink. Bateman had his in that way.

19. Were there any Carter labels known to you in the trade like the one annexed to Nathan Wood's affidavit and marked "Exhibit 1"?

Ans. That was known as Carter's label, and if we had an order for Carter's Bitters, we should see that they had that on the label.

20. Did you, previous to the visit of Johnson to your store which you have described, ever hear of, or did you ever receive notice of, any claim by any of the manufacturers to the exclusive right to the use of a twelve-sided bottle, having thereon, or on the label thereof, the words, "Atwood's Vegetable Physical Jaundice Bitters"?

(Objected to as to form and substance.)

Ans. None of them ever made any objection. Mr. Carter, one of the firm of Carter & Son, was in our store four or five years ago.
268 He made no objection. He knew what we were selling—must have known. He said at that time that if Moses Atwood had kept the right to himself instead of scattering it all over the country, it would have been valuable.

21. Did you, previous to said Johnson's visit, ever know or hear of any of the various manufacturers claiming an exclusive right to the bottle or label over the other manufacturers?

Ans. I never knew of any claim being made. None was ever made to us excepting by Johnson.

22. Are there or not in the patent-medicine trade other preparations put up in fluted, or eight-sided, or twelve-sided bottles, with words blown in the glass on the panels or sides of said bottles? If yea, how many can you enumerate now?

(Objected to.)

Ans. There are a number. There is "Wistar's Balsam of Wild Cherry," same height and holds the same—eight-ounce bottle—and is similar to Atwood's Bitters bottle; "Down's Elixir," put up in three sizes, in a similar bottle. There [are] a number; eight or ten.

23. How long have you known any or all of these in the market?

(Objected to.)

Ans. Some have been in the market ten years, and some have recently been got up.

24. Previous to the visit of E. B. Johnson to your store, which you have described, had your firm received any notice from the Manhattan Co. of their claim to have purchased the exclusive right to the use of the style of the sample annexed to their bill of complaint?

Ans. No; we had not up to the time I went away West.

25. Do you know whether all of the bitters prepared by Carter &

Son which were sold in this State were under the label like "Exhibit I" attached to the affidavit of Nathan Wood?

269 Ans. That is the only label of the kind that I know of.

26. State whether, during the five or six years that you have been acquainted with this business, there has or not grown up separate trades—businesses under various manufacturers' names, who have been, during that time, preparing and selling these bitters.

(Objected to for form and substance.)

Ans. There has.

27. Have the several manufacturers recognized and acted upon any division of territory of the country, or have they been in competition with each other?

(Same objection as to last int.)

Ans. Each manufacturer has been selling where he could. There has been a great competition.

28. By what name or names have the competing articles been designated or distinguished from each other in the market during this time?

(Same objection.)

Ans. Carter's has been known as "Carter's," Bateman's as "Bateman's," and the Mystic as the "Mystic," and the L. F. as the "L. F.," and ours as "Wood's." I know of some made in New York, by Day, Hoagland & Stigir; they had no sale here. I am not positive as to the name of Day, Hoagland & Stigir as the manufacturers in New York.

Adjourned until two o'clock.

TUESDAY, *April* 18, 1876.

298. Will you look at Exhibit 2 (of respondents), G. E. B., sp. ex'r, and state whether articles of this kind, with stamp and label, are at the present time on sale in the market.

(Objected to.)

270 Ans. They are. This bottle was obtained from J. W. Perkins & Co.

(Exhibit 2, G. E. B., sp. ex'r, examined and put in as part of respondents' case.)

Cross-examination by PHILO CHASE, Esq., counsel for complainants:

30. Look at the bottle and label now shown you, marked Plaintiffs' Exhibit A, July 14, 1875, and state whether it is the bottle and label of Nathan Wood & Son, the defendants.

Ans. I should say it was.

31. Was it this bottle of bitters, or one just like it, that your firm sold Eli B. Johnson, referred to in your answer to the 6th direct interrogatory?

Ans. It was a bottle similar to the one he took with him. We did not sell him any medicine.

32. And did the bottle of bitters which you sold Johnson have on it the same label or a fac-simile?

(Objected to.)

Ans. The bottle that he took had on it a label similar to this. The label was similar to this.

33. Are [you] acquainted with the bottle and label used by the plaintiff for "Atwood's Bitters"?

Ans. I have seen none of their bottles except those that are here. (Deponent showing bottle marked Exhibit 2, G. E. B., sp. ex.)

34. Have you never seen the bottle and label for "Atwood's Bitters" used by the plaintiff?

Ans. I should say that this was the bottle (referring to same exhibit as in previous answer).

35. When did Nathan Wood & Son get up the bottle and label Exhibit A, July 14, 1875?

Ans. It was seven or eight years ago that this was got up.

271 36. How long, prior to the first visit of Johnson to your store, did you put up Exhibit A, July 14, 1875, i. e., put the bitters in the bottle?

(Objected to.)

Ans. I think seven or eight years. As to this particular bottle, I think it might have been up three months before Mr. Johnson's visit.

37. Of whom did you procure your supply of bottles, such as Exhibit A, July 14, 1875?

(Objected to.)

Ans. We got them at Philadelphia, generally of different manufacturers of glassware.

38. State the names of the glass manufacturers from whom you procured bottles such as Exhibit A, July 14, 1875.

(Objected to.)

Ans. We have had bottles from Whitney Bros., at Glassborough, N. J. I think the first of them we got there; perhaps they made the mould. Bodine, Thomas & Co. We bought them at different places.

39. At how many different places besides these you have specified have you purchased them?

(Objected to.)

Ans. I could not remember all the places where our moulds have been. We bought them wherever we could make the best terms.

40. State the number of different places at which you bought these bottles like Exhibit A, July 14, 1875, as nearly as you can.

(Objected to.)

Ans. I think we bought of Whitney Bros. first; I am not positive. We have bought glassware of perhaps six different houses, wherever our moulds have been for our different styles of glassware.

41. Who designed the mould for the bottle Exhibit A, July 14, 1875?

272, 273, 274 (Objected to.)

Ans. This bottle has been in the market for a long time. I don't think any one in particular designed the mould. We bought these bottles second-hand; i. e., before the lettering was put on.

32. By the last question, I mean to ask you who got up the mould of this particular bottle, with the words "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.," blown in the glass?

(Objected to.)

Ans. I think we had the mould got up and lettered.

43. Did your firm, Nathan Wood & Son, design and prepare the mould for this particular bottle, Exhibit A, July 14, 1875?

(Objected to.)

Ans. We did not design the bottle, but we had the mould made to make that ware in.

44. Who made the mould?

(Objected to.)

Ans. I can't remember which particular factory made it. We were buying ware of Whitney Bros. at that time. I think perhaps they might have got it up. I know they had our business a long time.

45. Who printed the labels for you, such as the one on Exhibit A, July 14, 1875?

(Objected to.)

Ans. I presume Mr. Tucker, at the Printers' Exchange, Exchange street, Portland.

46. At the time Johnson made his first call at your store, had you on hand a supply of empty bottles like Exhibit A, July 14, 1875?

Ans. We might have had two gross and a half of the empty bottles; it might [have] been more or less.

47. Were these empty bottles labeled the same as Exhibit A, July 14, 1875?

275 (Objected to.)

Ans. They were not. They were packed in hay, in cases, just as they were shipped from the glass manufacturers.

48. How many labeled bottles of this kind did you have on hand?

Ans. About six dozen and a half. These were filled.

49. Was it your practice to put the labels on the bottles as you filled them with the bitters?

Ans. The bottles, when they came from the factory, were packed in hay in cases, and in putting up the case was opened and the bottle' cleaned, filled, corked, labeled, and stamped.

50. How many bottles of Atwood's Bitters like "Exhibit A, July 14, 1875," had you sold prior to Johnson's first call, in all, as near as you can approximate?

(Objected to.)

Ans. As near as I can recollect, five hundred to one thousand dozen. Our orders were from one dozen to five gross.

51. Can you distinguish any difference between the label on your bottle, "Exhibit A, July 14, 1875," and the label on the plaintiffs' bottle, "Feb. 14, 1876, Exhibit A"?

(Objected to.)

Ans. There is some difference in the border. Some difference in style of lettering.

52. What is the difference in the style of lettering in these two styles of labels?

Ans. The type is not just the same. I believe they read the same. The words "Jaundice Bitters" is not the same kind of type. One is a little larger and a little heavier.

53. Is there any difference in the words and letters on these two labels?

Ans. I think the words are the same. I think there is the same
276 wording on each. I think all the manufacturers use the same wording. The recommendation and the dose and direction are the same.

54. What manufacturers have used the same wording as in these two labels?

Ans. Carter and Bateman and H. H. Hay and ourselves, and all I have ever noticed or taken up and read—all the seven (7) manufacturers.

55. Will you swear that H. H. Hay has ever used a label with the same wording as on these "Exhibits A, July 14, 1875, and February 14, 1876"?

Ans. Taking the recommendation, the dose and directions, I think the wording is about the same. The heading he calls "L. F. Atwood's Improved Vegetable Physical Jaundice Bitters," and at the bottom it is somewhat different, having L. F. Atwood's and his names printed on

the bottom of the label. As far down as the direction goes it is the same as the others.

56. Then you do not mean to swear that H. H. Hay has ever used a label of precisely the same wording as the labels on "Exhibit A, July 14, 1875," and "February 14, 1876"?

Ans. With the exception of "L. F." and "Improved" and "Bilious," and down as far as L. F. Atwood's signature.

57. Now answer my last question directly and without evasion. Has or has not Mr. Hay ever used a label worded exactly like the labels on these two exhibit bottles last referred to?

(Objected to.)

Ans. It is just the same label, with those exceptions.

58. Did Mr. Hay ever use, to your knowledge, any label for his bitters worded any nearer to the wording on the two labels, "Exhibit A, July 14, '75, and Feb. 14, '76," than the label on defendants' "Exhibit one, April 3, 1876"?

(Objected to.)

Ans. I don't know.

277 59. Can you name any person besides the Georgetown parties—Carter and Bateman—who ever used exactly the same label, as to its wording, until your firm used it?

(Objected to.)

Ans. All the labels I have ever seen have been about the same as that we have used. All that I have noticed have been the same.

60. What manufacturers have used the same labels as the two "Exhibits A" referred to?

(Objected to.)

Ans. As far [as] I know, all of them have.

61. Specify what manufacturers, to your knowledge, have used labels like those on the two bottles, "A, July 14," and "A, Feb. 14."

(Objected to.)

Ans. There is Bateman and Carter. Then there was an imitation that I have seen that was about the same; and Hay's, and all that I have seen in the market, have about the same reading.

62. Can you specify any other names of manufacturers who have used this label?

(Objected to.)

Ans. No, I cannot. The Mystic and N. Y. manufacturers I have never noticed particularly.

63. Have Nathan Wood & Son ever put up and sold "Atwood's Bitters" with any other style of label and bottle than "Exhibit A, July 14, 1875," and Defendants' "Exhibit B, Feb. 14, 1876"?

(Objected to.)

Ans. There was a label with "M. F. Atwood" on it which we formerly used.

64. How lately have you used the label with "M. F. Atwood" on it?

(Objected to.)

Ans. We formerly used "M. F. Atwood"—some years ago. Since January of this year.

278 65. Did you ever use it before January of this year?

Ans. Yes.

66. How long before January of this year did you use the label with the name of "M. F. Atwood" on it?

(Objected to.)

Ans. A few years ago before this year.

67. Are you using it at the present time?

(Objected to.)

Ans. We are.

68. Do you mean by the label with "M. F. Atwood" on it the same label as on Plaintiffs' "Exhibit H, April 11, 1876"?

(Objected to.)

Ans. It is the same label, with the exception that M. F. Atwood's name is in red ink, and instead of his signature his name is printed in type on "Exhibit H."

69. How long has your firm been putting up and selling "Atwood's Bitters" in exactly the style of bottle and label of "Exhibit H"?

(Objected to.)

Ans. I think the first was made in the first of January of this year. It might have been a month earlier.

70. How much of "Atwood's Bitters" in this last-mentioned style of bottle and label have you put up and sold?

(Objected to.)

Ans. I think it is about 75 gross.

71. Where have you sold it?

(Objected to.)

Ans. Some in Iowa or out West, and in Massachusetts.

72. Are Weeks & Potter, of Boston, the agents of your firm for the sale of the article put up like "Exhibit H"?

(Objected to.)

Ans. Yes; they are our agents.

73. What quantities of the article put up in this form has your firm shipped to Weeks & Potter?

279 (Objected to.)

Ans. I think we have shipped two twenty-five gross lots. It may have been three. I don't know the exact sale; can tell by books.

74. Have you not shipped to Weeks & Potter, since January 1, 1876, more than one hundred gross of the article put up in this form?

(Objected to.)

Ans. We might have shipped as many as that, but I couldn't tell how many with[out] reference to our books.

75. Have you not, since January 1, 1876, shipped more than two hundred gross of the article put up in this form of bottle, and label to Weeks & Potter?

(Objected to.)

Ans. I don't think we have shipped so much.

76. Can you tell by referring to your books how many bottles of "Atwood's Vegetable Physical Jaundice Bitters," so-called, in the style of bottle and label such as "Exhibit H," you have put up and sold or sent away for sale?

(Objected to.)

Ans. I decline to answer.

77. How long have you made the bottle "Exhibit H," with the words blown in the glass "None genuine without my signature, Moses F. Atwood"?

(Objected to.)

Ans. This bottle was got up by mistake; it was a temporary bottle. We now have one with a fac-simile of the signature blown in the glass. It was a mistake at the factory in putting on his printed name instead of his signature.

78. Now answer my last question.

(Objected to.)

Ans. I think we got the first bottles in November, 1875.

79. By whom were these bottles made?

(Objected to.)

Ans. I decline to answer.

280 80. When did your firm first begin to use the label such as the one on "Exhibit H"?

(Objected to.)

Ans. This label, as far down as "Moses F. Atwood's" name, is the same as we have been using; and Weeks & Potter's name and Moses F. Atwood's signature in red ink we have used since the agency of Weeks & Potter for us.

81. How long has your firm used the particular label on "Exhibit H"?

(Objected to.)

Ans. We have used it since last fall.

82. From what time last fall have you used the particular label on "Exhibit H"?

(Objected to.)

Ans. I don't remember the particular time; it was the latter part of last year.

83. Has your firm ever put up and sold "Atwood's Bitters" in any other styles as to bottles and labels than "Exhibit A, July 14, 1875," and "Exhibit B, Feb. 14, 1876," and "Exhibit H, April 11, 1876"?

(Objected to.)

Ans. We have always put up two styles. No sir, I think not.

84. When did you first begin to use a short bottle such as "Exhibit H"?

(Objected to.)

Ans. I don't know the month, but it was the last part of last year that we put them up. At the time that we put these up, it was to comply with an injunction. We had the twelve-sided or eight-sided bottle. We have always put up two styles of these, one in twelve-square and one in round.

Adjourned until 9.30 o'clock, Wednesday, April 19, 1876.

281 WEDNESDAY, *April* 19, 1876.

85. How many different kinds of labels have you used in all, for "Atwood's Bitters?"

(Objected to.)

Ans. The label generally has been the same except——

(Complainant's counsel moves to strike out the answer as irresponsive.)

86. Do you mean to swear that you have used but one kind of label for "Atwood's Bitters" put up by you?

(Objected to.)

Ans. First, we used this label, "Exhibit M, of defendant, 17th June, 1875, G. F. E.," with "M. F. Atwood's" name instead of Nathan Wood's. Then we adopted Nathan Wood, and have used this (referring to "Exhibit 1, C. E. P., June 7, 1875"). Recently we have used the same label as this (referring to same "Exhibit 1, C. E. P.") with M. F. Atwood's name. We have used this (referring to "Exhibit B, C. E. P., Feb. 14, 1876").

87. Will you swear that you have used no other labels in putting up your so-called Atwood's Bitters, besides those you have so specified in your last answer?

(Objected to.)

Ans. That is all we have and that we know of. Previous to my going into the store I don't know what was used.

88. If you intended to sell your article on its own merits, why did you use all these various kinds and styles of labels?

(Objected to.)

Ans. We have sold them on their own merits, and introduced them into sections where they have never been known before. When we bought the right the sales were very small. Whenever parties ordered "Moses Atwood's," we sent those in the eight-square bottle, as Moses F. Atwood said that his receipt and Moses Atwood's were the same. As other parties sold to our customers, so we sold to theirs.

282 (Plaintiffs' counsel moves to strike out of this answer, "When we bought the right," also, "As Moses F. Atwood said that his receipt and Moses Atwood's were the same," as irresponsive and hearsay.)

89. Is there any other article in the trade in which you have used various kinds and styles of labels and names, as you have in respect to your so-called "Atwood's Bitters?"

(Objected to.)

Ans. I don't know of any. We have used no one's label unless we purchased it.

90. Did you purchase the label, or the right to use the label, of the "Porous Plaster Co." to use on plasters?

(Objected to.)

Ans. Never considered that we used it; that was D. W. Scribner's affair, not ours.

91. Did you not settle with the "Porous Plaster Co.," pay them damages, and allow judgment and decree to be entered against you for infringing the trade-mark rights of the Porous Plaster Co., by using its name and label?

(Objected to.)

Ans. We got out of it at the least possible expense and trouble that we could. We have Scribner's affidavit showing that he was the proprietor of those goods.

92. Did not Scribner and Jordan both testify in that case that your firm counterfeited or caused to be counterfeited the labels and trade-marks of "Alcock's India Rubber Porous Plasters," and that you paid the expenses of getting up such counterfeits, and that you employed them at a salary to sell such counterfeits, and that you sent them to Boston with instructions to hire rooms in which to secretly make such counterfeits, with instructions to carry on their operations of making these counterfeits with great precaution, by employing foreign girls who could not read the English language as operatives, by keeping the doors locked, the curtain drawn, and that you promised to take

283 care of them if they got into trouble while so employed by you, and other testimony of a similar kind?

(Objected to.)

Ans. I think that Jordan made oath to that. He also swore, when taking the poor debtor's oath, in Boston, that he was keeping books for Scribner. He made oath to a paper, where Scribner, on oath, deposes or says that he bought the goods in blank and put them up on his (Scribner's) own responsibility. Mr. Cleaves administered the oath here; I don't know who did in Boston. I deny that we ever had anything to do with the business in which Scribner was concerned.

92. Did not Jordan and Scribner both swear that these statements referred to by you were a sham, and that you caused them to be made

for the purpose of concealing these counterfeiting operations, and that, in fact, no oath was administered to them?

(Objected to.)

Ans. They swore to a great many things that were false.

94. Has Jordan recovered a judgment against you for his services in making those counterfeit plasters?

(Objected to.)

Ans. The case is in court now, I believe.

95. Has not said action been tried before the court and jury, and a verdict recovered by Jordan against you for such services?

(Objected to.)

Ans. It has in the superior court.

96. Can you state any more precisely than you have the date of Johnson's first call at your store?

(Objected to.)

Ans. When Johnson was here we ordered a bill of goods of him in exchange for plasters. The date of that bill is the 18th of Feb-
284 ruary. This is the only means I have of knowing, as I have never ascertained just what time it was when he was here.

97 What time in the day did Johnson call the first time?

(Objected to.)

Ans. It was some time before noon. I don't know the hour—it was some time about 10 o'clock.

98. How many times was Johnson in your store that day?

Ans. He might have gone out two or three times.

99. Do you know how many times he was in your store that day, so as to state definitely?

Ans. I think he was there nearly all the forenoon. I don't know how many times he went out. I know when we went to dinner he said he would go up and see Mr. Hay; I think he left on the three o'clock train.

100. What time after dinner did Johnson come back to your store?

Ans. We returned from dinner about half-past one, and he was there when we returned. He remained until train-time. We went to dinner at twelve; it is our dinner hour.

101. What was Johnson doing all the time he was in your store, from ten o'clock in the morning until three in the afternoon?

Ans. He was talking about getting up the company; and he gave us this order for goods. He looked about the store to see what we had. He thought we could get up a large trade with John F. Henry, Curran & Co. He was talking.

102. What were you doing that day between ten o'clock and three.

Ans. I was in the counting-room when he came in, and I stepped outside the door of the counting [room] for perhaps five minutes, and my father then introduced me. I was in his presence most of the
285 time, doing nothing but talking with him and going about the place with him. He occupied the time.

(Plaintiff's counsel moves to strike out this answer as irresponsive, evasive.)

103. Now answer the last question directly. What were you doing between ten and three o'clock?

Ans. I wasn't doing anything.

104. What are your general duties in the store?

Ans. I do general work about the place, attend to some correspondence—not all—give orders for printing matter, attend some to the

packing and shipping. I give orders for general materials, boxes and labels about town here.

105. What was your father doing between ten and three o'clock of that day?

Ans. I think he wasn't engaged in much of anything at that time.

106. Did you, on that day, have any clerks employed in your store?

Ans. We did.

107. How many?

Ans. There was the bookkeeper. I don't remember whether we were packing that day. We have a packer who is not engaged all of the time. There was four or five in the chambers.

108. Now did not you and your father attend to your duties about the store that day, between ten and three o'clock, the same as usual?

Ans. We did nearly all of the time that Johnson was there, and were in conversation with him.

109. Did you make any memoranda of the conversation with Johnson?

Ans. No.

110. Do you mean to say that Johnson was talking all the time from ten and three o'clock, except the time he was gone to dinner.

286 Ans. He was talking all the time. He was in conversation most of the time.

111. With whom did Johnson talk all this time?

Ans. Sometimes he directed his conversation to father and sometimes to myself.

112. Were you in the counting-room all the time between ten and three, except the time you were gone to dinner?

Ans. Not all of the time. We were in and out of the counting-room —in the store and counting-room.

113. Did you follow Johnson in and out of the counting-room and about the store wherever he went?

Ans. No, I did not.

114. Did your father follow Johnson in and out of the counting-room, and about the store wherever he went?

Ans. He did not. I don't think he went upstairs; he was downstairs all the time.

115. Did you follow your father that day wherever he went between ten and three o'clock?

Ans. No.

116. With whom did Johnson converse the most, with you or your father?

Ans. I think his conversation was directed to father mostly.

117. Was it not all directed to your father?

Ans. No.

118. Did not Johnson have conversation with your father that day which you did not hear?

Ans. I think I was present most of the time. I don't know whether there was anything said that I didn't hear or not.

119. Did your father hear all the conversation between you and Johnson?

Ans. I think he did, about all.

287 120. Was anybody present at any of the conversation between you and Johnson and between your father and Johnson besides your father and yourself?

Ans. When we were in the counting-room the bookkeeper was present. His name is Arvidson, and he is now with us.

121. How much of the time between ten and three o'clock was Johnson in the counting-room?

Ans. I think he was there most of the time.

122. Where was Johnson the rest of the time?

Ans. He went out two or three times. When he was in the store he was most of the time in the counting-room.

123. To whom was the remark of Johnson that your fluted or twelve-sided bottle and label thereon was a deception and a fraud?

Ans. He did not make that remark. No such remark was made.

124. In your answer to the 11th int. you say that Johnson said that "The lettering on the back of the bottle is a deception;" to whom did he make that remark?

Ans. That was made to my father in my presence. But he did not claim the label and bottle—only the lettering blown in the glass.'

(Plaintiff's counsel moves to strike out after "father" in the first line as irresponsive.)

125. Did you think the lettering referred to by Johnson was a deception?

Ans. I didn't think it was, as the medicine was the genuine thing. Don't know as I ever thought much about it till he came down here.

126. If you didn't think there was any deception why did you then cease selling the bitters put up in the twelve-sided bottle and label, as you have stated?

Ans. He made great objection to it, and, if there was likely to
288 be litigation from that, we discontinued it. We intended to adopt some other wording on the same style bottle, i. e., the glass lettering.

127. When did you form the intention of adopting a different style?

A. At that time. We were not particular about that lettering.

128. Did Johnson convince you that you were practicing a deception, and that you had no right to use on the bottle what he claimed to be a deception?

(Objected to.)

Ans. All parties were using that same style of bottle. We did not know wherein we had not so good a right as any of them. I mean the parties manufacturing the bitters.

129. Did you make any investigation of the Manhattan Co.'s right in respect to this bottle and label before discontinuing to sell the bitters put up with that style of bottle and label?

(Objected to.)

Ans. I did not know that they had any particular right to that bottle or label.

130. If you did not know or believe the Manhattan Medicine Co. had a particular right to that lettering on the bottle and label why did you discontinue its use?

(Objected to.)

Ans. We did not sell after Johnson was here. After the injunction we discontinued the use of the bottle, but we didn't sell any of them from the time that Johnson was here.

(Plaintiff's counsel moves to strike out this answer as irresponsive.)

130. (Question repeated.)

Ans. We were intending to get up a new mould of the same style as this (referring to Exhibit A, July 14, 1875), changing the lettering blown in the back, of Georgetown to Portland, and perhaps of inserting our name on the back or Moses F. Atwood's.

289 131. Were you intending to make any change in the label on this bottle?

Ans. I do not know that we were at that time.

132. How long had you been intending to make a change in the lettering on the bottle, as you have stated in your answer to 130th int.?

Ans. Since the time that Johnson was here.

133. If you did not believe your lettering on the bottle was a deception why did you intend to make such change?

Ans. Johnson objected to it, and we were not particular what we did have on it.

134. Do you change your trade-marks whenever a party objects to your using them?

(Objected to.)

Ans. A party objected to our using the words "Lung Balsam" once. That was valuable to us, and we didn't choose to change it. This was of no value, and we concluded to make the change we did. When Johnson objected to this we told him if there was any objection to this lettering blown in the glass, Exhibit A, July 14, 1875, that we would get up another mould having that lettering left off. He inquired what such a mould would cost. We told him about twenty dollars (20). He wanted to buy that mould and pay us twenty dollars, and have us give him an order on the glass-works for it. We refused to do so.

(Plaintiffs' counsel moves to strike out all of the answer above, commencing with the words on the second line of this page commencing with "he inquired," &c., as irresponsive.)

Adjourned until 2.30 p. m.

290 135. Have you not and your father used four or five different labels and bottles for your so-called "Atwood's Bitters" besides those you have mentioned?

(Objected to.)

Ans. I don't remember of using any others than those I have mentioned, though we might. I think we used the long bottle at one time without any letters blown in the glass.

136. Describe the first bottle used by you for putting up the bitters.

(Objected to.)

Ans. The bottle that I used when I first went into the store was the long bottle without letters, and twelve-square also without letters. I don't remember exactly, as it is twelve years ago.

137. Now, after looking at the bottle now shown you, do you not think you first put up the bitters in a plain round bottle?

(Objected to.)

Ans. I stated in my previous answer that I used the long round bottle without letters. The one you show me contains an ounce or two more than [the one] without letters.

138. And did the label used on the last-mentioned bottle have on it the name of Moses Atwood or Georgetown, Mass.?

(Objected to.)

Ans. I don't think it had.

139. How long did you continue to use the long, round, smooth bottle without any lettering, and a label without either of the words Moses Atwood or Georgetown, Mass., on it?

(Objected to.)

Ans. The long bottle never had the name of Moses Atwood on it.

(Plaintiffs' counsel moves to strike out the answer.)

291 140. (Question repeated.)

Ans. I don't remember when we discontinued the use of that bottle, nor when we substituted Nathan Wood for M. F. Atwood.

141. State how many years, as nearly as you can, you used the smooth bottle without any lettering, and a label without the words M. F. Atwood or Georgetown, Mass., on it.

(Objected to.)

Ans. On the smooth round bottle the word Georgetown was never used, nor upon the label upon the bottle.

(Plaintiffs' counsel moves to strike [out] the answer as evasive or irresponsive.)

142. (Question repeated.)

Ans. It was in use when I went into the store—the smooth round bottle, and we continued to use it till within five or six years, but don't remember exactly.

144. State when, as nearly as you [can], you commenced to use such smooth round bottle and label without the words Moses Atwood, Georgetown, Mass., on it.

(Objected to.)

Ans. The smooth bottle was in use when I went into the store about twelve years ago.

145. Was not H. H. Hay using a smooth round bottle for L. F. Atwood's Bitters during the time you used the smooth round bottle without lettering?

(Objected to.)

Ans. I believe he was using a similar. I don't know whether there was any lettering on it. I believe there was not.

146. Had not H. H. Hay used this kind of bottle for some considerable time previous to your using it?

(Objected to.)

Ans. I can't state, because I was not acquainted with the medicine before I went into the store.

292 147. Now, did you change this first style of bottle and label until after H. H. Hay changed the style of his bottle and label?

(Objected to.)

Ans. We changed about the same time. The reason was that material went up so that we adopted a smaller size.

148. In what did the change consist?

(Objected to.)

Ans. In adopting a seven-ounce bottle for eight, and having the mould lettered. The label I don't remember about being changed at that time.

149. Did you not adopt the lettering blown in the glass at the same time you changed the label, or at a different time?

(Objected to.)

Ans. I can't state exactly when the changes were made.

150. How long since you have used the name Nathan Wood on the round smooth bottle?

(Objected to.)

Ans. As near as I can judge, for about four or five years.

151. Do you or not now claim the right to use the style of label on "Exhibit A, July 14, 1875," and the lettering blown in the glass of this bottle, to wit: "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass."?

(Objected to.)

Ans. We claim this label and the twelve-square bottle. We claim we have a right to that mould—the twelve-square bottle—and to that label. This lettering blown in the glass we do not claim.

152. When did you abandon your claim to the right to use the lettering "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.," blown in the glass?

(Objected to.)

Ans. At the time Johnson was here.

293 153. Can you give any reason why you should abandon all claim to use the words "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.," blown in the glass of the bottle, and not abandon precisely the same words on the label used on the bottle?

(Objected to.)

Ans. I don't know but what we have a right to use the lettering blown in the glass on the back side. But, as I stated, this is immaterial; we don't care anything about it.

154. Have you or not made some five or six different changes in your styles and labels on the round bottle?

(Objected to. Withdrawn.)

155. In your answer to the 20th int., you say that Mr. Carter, one of the firm of Carter & Sons, four or five years ago; which Carter was it?

Ans. I couldn't tell you. He gave us his card. He was one of the young Carters. I should judge at that time that he was thirty-five years old. He was a short man, I think, middle-sized man, except he was pretty stout—might have weighed 175 pounds. I should say about five feet four inches, say.

156. Were you then using the bottle which you say you first used for the bitters?

Ans. We were using the smooth, long, round bottle, and the twelve-square bottle with the lettering (referring to "Exhibit A, July 14, 1875").

157. Did you show the Carter who you say visited your store five or six years ago the bottles you were then using for your Atwood's Bitters?

Ans. The bottles set on the shelf in the store—both kinds. I don't remember that I called his attention to them particularly.

158. Who was present in the store at the time you say Carter called?

294 Ans. My father was in the store. I think he saw him first.

159. Can you fix the time of this visit any more definitely than to say it was four or five years ago?

Ans. I haven't any means of fixing the time. He said he was going to the Provinces. He left his card.

160. Have you not stated several times during the last year, and to different persons, that you had only just begun to use the twelve-sided bottle at the time this suit was commenced?

Ans. No, I don't think I have. I don't see why I should make such a statement when we have used the bottle so long.

161. Will you swear positively that you did not make such statements?

Ans. I know of no such statements that I ever made. Yes, I will.

162. Have you ever told any person that before the suit was commenced you had put up only about twenty-five gross of the twelve-sided bottle kind of bitters?

(Objected to.)

Ans. No.

163. When did you first know that the Georgetown parties were using the label on "Exhibit A"?

(Objected to.)

Ans. I could not tell the definite time. I have seen the bitters twelve years ago, and I think the label was the same. Carter was using the twelve-sided bottle, and Bateman the panel bottle, "Exhibit A, C. S." Bateman, after that, adopted the twelve-sided. Don't [know] exactly just when.

164. Did or not you know that Bateman and the other Georgetown parties and the Mystic parties all claimed under Moses Atwood the right to use the label and style of bottle used by them?

(Objected to.)

295 Ans. I never knew that they claimed anything.

165. Did you never know or hear that Moses Atwood first originated and used the label on "Exhibit A"?

(Objected to.)

Ans. I suppose Moses Atwood originated the label.

165. In your answer to the 26th int. you say that separate trades and businesses have grown up in making and selling "Atwood's Bitters;" can you name any such trades or businesses besides those you have already mentioned?

Ans. No; I can't state any particular ones.

166. In your answer to the 28th int. you say that Carter's Bitters has been known as "Carter's," Bateman's as "Bateman's," and the Mystic as the "Mystic," and the "L. F." as "L. F.," and ours as "Wood's;" was the bitters put up in the style of bottle and with the label "Exhibit A, July 14, 1875," ever known in the market as Wood's Bitters?

Ans. I don't know as they were known as "Wood's." If any one ordered "Wood's Bitters" we sent them the round bottle. If they ordered "Moses Atwood's" we should send the twelve-square bottle. If they had ordered "Carter's Atwood's Bitters" we should have gone out and got them, or Bateman's, or the Mystic.

167. What was the difference between the style of bottle and label used by the Mystic parties and "Exhibit A, July 14, 1875"?

Ans. I don't know what difference.

168. Did you know that W. B. Dorman, of Georgetown, was putting up the bitters in the style of bottle and label of "Exhibit A, Feb. 14, 1876"?

(Objected to.)

296 Ans. I don't know Dorman. I don't know. I think I have heard he was putting them up. I must have heard it since this suit was commenced. I have heard his name; never saw his bitters that I know of.

169. When you had orders for Moses Atwood's Bitters why did you not send the bitters put up by you in the round bottle like "Exhibit B"?

Ans. Because by their ordering Moses Atwood's we understood they wanted those in the twelve-square bottles.

170. Was there any difference in the composition of the bitters put up by you in the round bottle and that put up by you in the twelve-sided bottle?

Ans. There was no difference.

171. If there was no difference in the bitters put up in these different bottles why did customers prefer the one above the other?

Ans. I do not know why they should. We filled orders as they came. I don't [know] why they should prefer Carter's to Bateman's.

172. Was it or not generally understood in the trade that Moses Atwood prepared and sold what were known as Atwood's Bitters at Georgetown, Mass.?

(Objected to.)

Ans. I believe it was understood that he was not connected with them?

173. Did or not customers who ordered from you Moses Atwood's Bitters understand that they were purchasing bitters such as had been put up by Moses Atwood at Georgetown, Mass.?

(Objected to.)

Ans. The receipt that we had was invented by Moses Atwood, I suppose.

Direct resumed by Mr. CLIFFORD:

174. Referring to your 35th int. and ans. state whether, when
297 you became acquainted with this business, the bottle "Exhibit A" was not as to form and size well known to the trade?

(Objected to as to form and substance.)

Ans. It was. Mr. Phillips kept the bottles here in stock. I think we bought the twelve-square bottles of him when we first put them up.

(Objected to for form and substance.)

175. Are or not the bitters put up by you known to the wholesale dealers who purchase them to be prepared by you?

Ans. They are.

176. Will you look at the notice printed at the end of the box and marked "Exhibit 3, G. E. B.," and state what it is?

(Objected to.)

Ans. It is a testimonial from the wholesale druggists of this city and State. I have the original if wanted.

177. State whether in your advertisements of your bitters they are stated to be put by Nathan Wood or by Nathan Wood & Son.

(Objected to for form and substance.)

Ans. It is generally known among the trade that we put them up.

(Objected to for form.)

178. For how many years have you thus advertised them, and how extensively?

Ans. We have advertised them quite extensively in newspapers, posters, and circulars, and at one time we sent three hundred thousand circulars—from two to five hundred to each party—to the general stores through the State and New Hampshire.

179. Was or not the claim made by Johnson to the words in the glass of the bottle, like "Exhibit A," the first claim, to your
298 knowledge, ever made to you of any right to prevent you from using any of the words or labels connected with these bitters?

(Objected to for form.)

Ans. His was the first and only claim ever made.

180. What change did you intend to make from the bottle like "Exhibit A" after Johnson gave you that notice?

(Objected to.)

Ans. To substitute for "Moses Atwood, Georgetown, Mass.," our

own name and Portland, Me. I believe we had not come to any definite understanding as to what the change was to be.

181. Why, when your mould was changed as you say you intended, did you adopt the form of bottle "Exhibit H"?

Ans. At the time of the hearing before Judge Shepley he restrained us from using that form. We then not only changed the lettering but abandoned using that style of bottle, and this was got up to comply with that injunction. There is no other Atwood's Bitters put up in a bottle like that; there is no other bottle that I ever saw that had a signature blown on the side like "Exhibit 4, G. E. B., ex'r."

182. Will you explain why one of the names, to wit, the one on "Exhibit H," is printed and that on "Exhibit 4" an imitation of writing, and which is the one now in use by you?

Ans. This one on "Exhibit H" is printed letters, and is a mistake made at the glass-factory, as we intended to have a signature like "Exhibit 4," and sent the signature to the factory. This "Exhibit 4" is the one we are using now.

Adjourned until 9 a. m. Thursday, April 20, 1876.

299 THURSDAY, *April* 20, 1876.

183. When the Mr. Carter, of whom you have spoken, visited your store what, if anything, did he say about the manufacture of these bitters having become known or common?

(Objected to, having already been gone over on direct examination.)

Ans. I remember of asking him who the manufacturers [were]. I remember asking who L. F. Atwood was. He said he was a brother of Moses. I had thought him the son. I think he had some conversation with my father about Atwood's Bitters, but I don't remember all the conversation.

184. When he visited your store were the bitters up in the twelve-sided bottles to be seen on the shelves?

(Objected to.)

Ans. They were, about the middle of the store, on a low shelf; about the same place they were when Johnson came.

185. Was there any difference in the places where the two kinds of bitters were placed, as to the ease with which they could be seen by a person visiting the store?

(Objected to.)

Ans. The round bottles were in wooden and paste-board boxes of this kind (referring to "Exhibit 3, G. E. B."), and piled up to the shelf upon which these twelve-square sat, these latter being paper packages. They sat close by each other.

186. Did, or not, the packages or boxes in which the bottles of your bitters were placed up, say to the year 1874, carry the words "Prepared by Nathan Wood," or "Nathan Wood," somewhere on them?

Ans. The labels on the boxes were the same as on the bottle. This label (referring to "Exhibit A, July 14, 1875,") was on the package. The revenue stamp on every bottle might have been cancelled by stamping in our name.

300 187. Was it, or not, known by those to whom the article was sent by you by whom it was prepared?

Ans. It was.

188. Is it, or not, the fact that certain classes of purchasers buy a bitter only when put up in the form of "Exhibit B." and others when put up in other forms of bottles &c?

Ans. It is understood by the wholesale dealers here, that if a party orders Atwood's Bitters, that these, like "Exhibit B," are wanted.

189. Now, are there not one class of purchasers who only buy like "Exhibit B," others who buy in the form of "Exhibit A," and others, for instance, "L. F."?

(Objected to for form and substance.)

Ans. There are some who buy Carter's, some Bateman's, and some ours, and some "L. F.," and some buy both kinds.

Cross-examination resumed by Mr. CHASE:

190. Suppose a consumer bought from a dealer a bottle of bitters like "Exhibit A, July 14, 1875," how could he ascertain from the bottle or label it was put up by Nathan Wood & Son?

Ans. I don't know that he could ascertain unless he asked the dealer from whom he got them. If any one ever asked us who made these bitters, we told them we made them.

(Plaintiff's counsel moves to strike out the answer commencing "If any one, &c.," as irresponsive and evasive.)

191. If consumers believe the compound in "Exhibit A, July 14, 1875," and that in your round bottle, "Exhibit B," was one and the same thing, do you think, if they had ordinary common sense, they would prefer one above the other?

(Objected to.)

301 Ans. If they were acquainted with both kinds they wouldn't care which they had.

192. Where did you sell your article put up in the twelve-sided bottle like "Exhibit A, July 14, 1876?"

Ans. We sold it in Maine, New Hampshire, Massachusetts. I don't remember that we ever sold any in Vermont.

193. To what dealers in Massachusetts did you ever sell any of this kind?

Ans. I don't know as I can remember who. There are so many orders I can't tell the names of all.

194. Will you and can [you] state the name of a single dealer in Massachusetts to whom you ever sold any of the article put up in the style of "Exhibit A, July 14, 1875," in the fluted bottle?

Ans. We have sold to Willard & Lane, Taunton, Mass.

195. Can you name any others?

Ans. I don't think of any now.

196. Can you, by referring to your books, name any others in the State of Massachusetts to whom you sold any of the fluted kind?

Ans. I don't think I could by reference to the books. They are all charged as Atwood's Bitters.

197. To what dealers in New Hampshire have you sold this fluted bottle kind?

Ans. I could not say. Whoever ordered that kind.

198. Can you specify a single dealer in the State of New Hampshire to whom you ever sold any of the fluted kind like "Exhibit A, July 14, 1875?"

Ans. No; I can't specify any particular person.

199. Can you specify the names of any dealers in the State of Maine, or elsewhere, to whom you ever furnished this kind?

Ans. I can't state.

302 200. When did you sell to Willard & Lane, of Taunton, Mass., this fluted bottle kind?

Ans. I don't remember, though we have an order in now for five gross of Atwood's Bitters from them.

201. State the time, as nearly as you can, when you made this sale?
Ans. They have had them at different times. I don't [know] when they have had them.
202. Can you specify the time within a year when you sold them any of the article put up as "Exhibit A, July 14, 1875?"
(Objected to.)
Ans. They have had them within a year. I could not say positive if they have had any since last spring.
203. What quantity of this fluted bottle kind did you sell Willard & Lane? Within a year, or at any other time?
(Objected to.)
Ans. I don't remember what quantity. We have an exchange trade with them.
204. Will you swear that you have ever sold to Willard & Lane, of Taunton, Mass., as many as fifty bottles of the fluted bottle, "Exhibit A, July 14, 1875?"
(Objected to.)
Ans. Yes; I think we have.
205. Will you swear to that?
(Objected to.)
Ans. I am quite positive that they are the parties we sold to.
206. (Question repeated.)
Ans. Yes.
207. How many will you swear to?
(Objected to.)
Ans. I can't tell the quantity.
208. Will you swear to any more than fifty?
(Objected to.)
303 Ans. No, I can't swear to any quantity. I know they have had them.
209. How did the order come from Willard & Lane which you filled with the fluted kind, "Exhibit A, July 14, 1875"?
(Objected to.)
Ans. I think their orders came by mail, though I think they have been through here and we have been there—to Taunton.
210. I mean in what way, i. e., by what words did they designate the kind of bitters in their order which you filled with the "Exhibit A, July 14, 1875," kind?
(Objected to.)
Ans. This last time I think they ordered Atwood's Bitters. When the samples of both kinds were shown them, I think they took their choice.
211. At what prices have you sold the fluted bottle, "Exhibit A, July 14, 1875," kind?
(Objected to.)
Ans. Twenty-seven dollars a gross. Both kinds are the same price.
212. Have you ever sold them for less?
(Objected to.)
Ans. I don't think we ever have. I know of no instance now.
213. At what prices have you sold the "Exhibit H" kind which you have recently put up?
(Objected to.)
Ans. The prices for both kinds are twenty-four dollars now.
214. Will you swear that you have not sold the bitters put up like "Exhibit H," April 11, 1876, for less than twenty-four dollars per gross?

(Objected to.)

Ans. Weeks & Potter have them at a less price.

304 215. At what prices do you furnish them to Weeks & Potter?

(Objected to.)

Ans. Decline to answer.

216. Have you furnished the article in the form "Exhibit H," to any party or parties except Weeks & Potter?

(Objected to.)

Ans. I don't remember that any one has had that bottle excepting them, and I don't remember how many bottles they had.

217. Are Weeks & Potter concerned with you in any way in the manufacture of the article in this form?

(Objected to.)

Ans. No, they are not.

218. What interest have Weeks & Potter in the sale of the article in this form?

(Objected to.)

Ans. They have a commission—sales commission.

219. What commission do you allow Weeks & Potter on the sales of this article?

(Objected to.)

Ans. I decline to answer.

220. Did you or any one show Weeks & Potter the injunction issued against you in this suit, or were they informed of the injunction?

(Objected to.)

Ans. I think they knew of the injunction on the twelve-square bottle. I did not show them the injunction. I don't know whether my father did or not.

221. After Johnson's first visit to your store, did you receive from him, or any one, twenty dollars?

(Objected to.)

Ans. I think we received a check from John F. Henry, Curran & Co. for that amount. The date of the letter accompanying the check

305 is Feb. 24, 1876. The letter is attached to Nathan Wood's affidavit, and marked "Exhibit H."

(Plaintiffs' counsel moves to strike out all of the answer after "Feb. 24, 1876," as irresponsive).

222. When did you last see Moses F. Atwood?

Ans. I never saw him.

223. When did you last have any written communication with Moses F. Atwood?

Ans. This past fall and winter—say since November—about that time.

224. Have you had any written communication from Moses Atwood?

Ans. None that I know of.

JOHN T. WOOD.

(Adjourned until 9 o'clock, Friday, April 21, 1876.)

FRIDAY, *April* 21, 1876—9 o'clock a. m.

Deposition of William L. Arvedson.

WILLIAM L. ARVEDSON, witness for respondents, being sworn, on oath deposes and says as follows, in answer to interrogatories propounded by WILLIAM H. CLIFFORD, Esq., counsel for defendants.

1. State your name, age, residence, and occupation.

Ans. William L. Arvedson; forty-two, book-keeper; Portland.

2. Are you now, and how long have you been in the employ of Nathan Wood & Son?

Ans. I am, and have been for about three years.

3. Do you remember the visit to your store of a man named Parker? If so, state as nearly as you can when it was?

306 (Objected to.)

Ans. About a year ago, or last May, there was a young fellow came here just before we were closing, said he had the dyspepsia very badly, and wanted some bitters. I asked him what kind he wanted. He said he didn't know. I showed him some Buzzell's Bitters. He said that wasn't the kind, but could tell if he saw what he wanted; and on the table right opposite were some bitters put up like "Exhibit B." He said that was the kind, and wanted to know how much I would sell him a dozen for. I told him for two dollars and a half a dozen. He said he would like to have a bill of them, as a friend of his was going to take them with him. He only took a half dozen of them. I gave him a bill of them, and he took them away, paying for them. The next night about the same time he came back again, and had two of those bottles with him, or two like them; said that this friend of his had been accustomed to taking Massachusetts Bitters, as he termed them, I believe; that as he had [been] taking the others, and knew about them, he had rather have them. He wanted in exchange two like "Exhibit A, July 14, 1875." I refused, saying that we didn't sell them. Mr. Wood came in then. There was considerable talk; I can't remember all of it. I recollect he told him the same story he told me about this friend of his, and Mr. Wood told me I could give him a couple of them. He offered to pay me for them. I refused to take any pay. He put the two round bottles down and went off. I think that is about all I can recollect of that transaction now.

(Plaintiffs' counsel moves to strike out the answer as hearsay, irrelevant, and immaterial.)

4. Do you remember the visit to your store of Eli B. Johnson, in the spring of 1875? If so, state what you remember of what was said and done at that time.

(Objected to.)

307 Ans. He came there, I think, some time in February, introduced himself to me as Mr. Johnson, of the firm of Henry, Johnson & Lord, of Burlington, Vt. (I being in the office alone at the time he came in). Mr. Wood was about the store and came into the office in a few minutes. He introduced himself to Mr. Wood and son in about the same way—I think just the same; said they had had considerable dealings together, and after some little talk on various matters, don't remember what, he said that he came to talk about bitters, in the interest of the Manhattan Medicine Co.; said he had been to Georgetown; had bought out one party there and had the refusal of another, and wanted Mr. Wood to sell him his right in the bitters for stock in this company. There was considerable talk about it. I can't remember all just now, but I recollect that there was talk about Mr. Hay. Mr. Wood said he would sell out if he would, and that he (Johnson) had better see him. He said he would go and see him, and he started off. He came back after dinner. I was in the office alone then. Mr. Wood had not come back from dinner. I asked him what success he met with; said he didn't meet with very good success. Mr. Hay pitched into him. He asked me what kind of a man Mr. Hay was. He said he appeared to him like a man who used opium or drank.

I told him I didn't know anything about Mr. Hay at all. He said he thought it would be for the interest of Mr. Wood to sell out to him; that they could advertise him down. I don't recollect any more now. Yes, after Mr. Wood came back there was some talk about the bitters still. He wanted to buy the mould for "Exhibit A, July 14, 1875." They had considerable talk about the bitters bottle and mould, and wanted to know what the mould cost. Said he would give twenty dollars if they would give him the mould. This talk acout the mould took place at his second visit on another date. No; I am confident
308 that it took place at this visit in February. There was no trade made about the mould then, as I understood.

(Plaintiff's counsel moves to strike out all incompetent and improper testimony in the foregoing answer.)

5. Since the visit of Johnson to your store, has or not the sale of the article like "Exhibit A," been discontinued?

Ans. It has. Application for them has been made, and we have refused to sell them.

Cross-examination by PHILO CHASE, Esq., of counsel for complainants:

6. At the time of the visit of Eli B. Johnson to your store in February, 1875, where did Nathan Wood & Son keep the article put up like "Exhibit A, July 14, 1875?"

Ans. What there was was right on the shelf.

7. At the time of the second visit of Eli B. Johnson, where did Nathan Wood & Son keep this article?

Ans. I can't say. My impression is they were still there.

8. Where did Nathan Wood & Son keep the article, at the time of the call of the young man in May, as you have testified?

Ans. In the front shop. Not on shelves; some on a table and some piled up in boxes—paste-board boxes; guess there was some in wooden boxes too.

9. When the young man to whom you have referred wanted to exchange the bottles of bitters, "Exhibit B" for "Exhibit A," did you inform him that the two bottles contained precisely the same bitters or composition?

(Objected to.)

Ans. I can't say.

10. Do you think you did?

Ans. I don't know; might.

309 11. Did you ever know a customer who was buying the article for consumption, to prefer one above the other, if he was informed that the contents of the two bottles were alike?

(Objected to.)

Ans. I don't know.

12. Would you suppose that any customer of ordinary intelligence, buying the article for consumption, would prefer either "Exhibit B" or "Exhibit A, July 14, 1875," above the other, if he understood the contents of the two bottles were alike?

(Objected to.)

Ans. I can't answer that question. A man might think that the articles was different, if he was told that they were alike, if he had been accustomed to one particular kind.

13. My question supposes that the contents of the two bottles were alike. Would he, in such case, prefer one over the other?

(Objected to.)

Ans. If he knew they were alike, he probably would not.

14. Then, in your opinion, do not customers who buy the defendants' article put up in one form of label and bottle instead of it put up in another style of bottle and label think the articles in the two bottles different?

(Objected to.)

Ans. I don't know what they think.

15. I ask your opinion on this matter.

(Withdrawn.)

16. How long have you been engaged in the medicine business?

Ans. Haven't been engaged in the medicine business at all.

17. How long have you been employed in the store of Nathan Wood & Son?

Ans. I have been employed as book-keeper three years.

18. Now I want your opinion as asked in the 14th int.

(Objected to.)

310 Ans. I can't answer it. I don't know anything about it—what they think.

19 Did the young man referred to in the third answer give you his name at either time he called?

Ans. I think he did. He got me to make out a bill. Said he was from Skowhegan. I won't say his name was Parker; he gave me some name.

(Plaintiff's counsel moves to strike [out] the answer as irresponsive.]

20. (Question repeated.)

Ans. I think he did.

21. What name did he give?

Ans. I couldn't say.

23. Did you ever see this young man before or since those times.

Ans. Don't ever recollect of seeing him but those two times.

24. Did the young man talk with anybody besides you at either of the two times he called?

Ans. He did.

25. With whom?

Ans. Mr. Nathan Wood.

26. Did you hear the conversation between him and Mr. Wood?

Ans. I heard pretty much all of it, I think.

27. Have you, in your testimony, stated what he said to Mr. Wood, as well as to yourself?

Ans. I couldn't say unless I read the testimony over. My impression is I merely said what he said to me.

27. Were you and the young man and Mr. Wood all in the presence of each other when the young man addressed you and when he addressed Mr. Wood?

Ans. Part of the time. When I went to show him the bitters, Mr. Wood was in the office.

311 28. State all you heard the young man say at either time he called, except what you have already stated.

Ans. He said he was of Skowhegan, and he gave his name, which I don't recollect.

29. Is that all?

Ans. I think that is all, except what I have said. I made a bill and gave him. I don't recollect in what name; I think it was not Parker. I made the bill the first time he called.

30. Was there any difference in the price for article "B" and article "A" which you let the young man have?

Ans. Was no price on this kind—"Exhibit A, July 14, 1875"; we were not selling them.

31. Had there ever been any difference in price, at wholesale, or retail, between those two kinds?

Ans. Don't think there ever had.

32. To whom did you first tell this young man's story?

Ans. Don't know, unless I first told it to my wife. I wrote it down that night in my diary.

33. What occasion had you to tell the story to your wife?

(Objected to.)

Ans. Nothing more than that I often read over what I write down in my diary.

34. When did you first tell the story to your wife?

(Objected to.)

Ans. If I told it, it was that night after writing it down.

35. Did you tell your wife the same story that you have told here today?

(Objected to.)

Ans. I don't know.

36. To whom else besides your wife have you told this story?

Ans. I probably told it to Mr. Wood, and have told it to Mr. Clifford.

312 37. Have you the diary here?

Ans. No.

38. Where is it?

Ans. At home.

39. Will you produce it?

Ans. No.

40. What objection have you to producing it?

Ans. Private property—nothing to do with this case.

41. Will you not allow the single transaction of this young man occurrence to be seen?

Ans. I will not allow the diary to go out of my hands unless I am obliged to.

42. Will you not allow it to be seen, providing you can keep and retain the diary in your own hands?

Ans. That particular part of it I have no objection. No other part of it can be seen.

43. Will you then produce it for that purpose alone?

Ans. I will think of it.

44. How long do you require to think of it?

Ans. Until I come here again this afternoon.

45. Have you stated all the conversation which occurred between you and Mr. Johnson, or between Mr. Johnson and the Woods?

Ans. I should say I had not stated all. There was a great deal of conversation carried on there.

46. Have you stated all you can remember?

Ans. I think I have stated about all I can remember of the first conversation.

47. Did Johnson say why he wanted to buy the mould of "Exhibit A"?

Ans. I can't recollect. There was some conversation about that.

48. Did Mr. Wood ask Johnson why he wanted to buy the mould?

Ans. I couldn't say.

313 49. How long was Johnson in your store that day?

Ans. I should say he was there a good part of the forenoon and again after dinner; think he went away in three o'clock train.

Direct resumed by Mr. CLIFFORD:

50. Will you give a description of the man whom I called Parker?

Ans. He was a sickly looking fellow. He looked like one almost gone in consumption; so much so, that I remarked to Mr. Wood that I didn't think he would take many bitters. He looked like one well calculated to deceive. He was pale, slim, about five *foot* eight inches; can't say if he had a moustache, nor as to the color of his eyes; didn't look at his teeth; seems as if he did have moustache—can't say, however.

Cross resumed by Mr. CHASE:

51. Did you notice anything peculiar about his eyes?

Ans. No; I can't say that I did.

52. Did you notice whether he was bow-legged or straight-legged?

Ans. I should say he was straight-legged.

53. Did he have a straight or crooked nose?

Ans. I think it was straight, as near as I can recollect now.

54. Will you call his nose a Grecian, Roman, or pug?

Ans. I am not an expert or sculptor. I can't say.

55. What was there about the appearance of this young man that you thought was calculated to deceive?

Ans. His being sickly looking—thin, I thought he was in consumption.

W. L. ARVEDSON.

314 UNITED STATES OF AMERICA,
District of Maine:

Personally appeared the above named W. L. Arvedson, and made oath that the above deposition by him subscribed contains the truth, the whole truth and nothing but the truth.

Before me.

GEO. E. BIRD, *Sp. Ex'r.*

Deposition of Nathan Wood.

NATHAN WOOD, being duly sworn, on oath deposes and says as follows, in answer to interrogatories propounded by W. H. CLIFFORD, Esq., respondents' counsel.

1. State your name, age, residence, and occupation.

Ans. Nathan Wood; sixty-three; Portland; druggist.

2. Are you, or not, one of the defendants in this suit?

Ans. I am.

3. How long have you been in the drug business?

Ans. Since 1843.

4. When was the present firm organized?

Ans. I couldn't state—some three years ago.

5. When did you begin the manufacture of these bitters?

Ans. May, 1861.

6. Have you continued in the manufacture without interruption till now?

Ans. Until the time the Manhattan Medicine Co. put the restraint upon us.

7. Was there much, if any, trade in this article in this State when you began? If so, state how much.

Ans. The first year, there was not much.

8. Will you state what means you employed to advance the sale of the article and to make it better known?

315 Ans. I left them on commission with my agents, and advertised that I had bought the right, and so forth.

9. State if you were and have been at expense in advertising that you prepared and put this article for sale in the market.

Ans. We have. One year we expended $1,000 and over.

10. What was the effect, in the course of time, of your advertisements, &c., upon your sales of the article?

Ans. It increased the sales very essentially.

11. Has or not the preparation which you make become known in the markets where you have introduced it?

Ans. It has.

12. Is it or not known by the purchasers by whom it is prepared, and where?

Ans. It is.

13. For how many years should you state this to have been the fact?

Ans. I should say ten years.

14. Previous to your introduction of your article, by whom had what had been sold in this State been for the most part, as far as you know, sold?

Ans. Levi F. Atwood, and some of Bateman's.

15. Who, as far as you know, sold the Bateman Bitters in this State?

Ans. L. H. Bateman.

Adjourned until 2.30 p. m.

16. Of whom, if any one, did you purchase a recipe or formula for the preparation of your Atwood's Bitters, and when?

(Objected to.)

Ans. I bought it of Moses F. Atwood, May, 1861.

316 17. State how you first heard of said Moses F. Atwood, and where he was.

Ans. I heard of him through my traveling agent, Nathaniel F. White. Atwood was traveling in this State.

18. What was said Atwood doing?

Ans. He was settling up his affairs in this, as he represented.

(Objected to.)

19. What matters was he settling?

(Objected to.)

Ans. Bills for Atwood's Bitters left on commission by him. So he represented to my agent.

(Plaintiff's counsel moves to strike [out] the answer as hearsay.)

20. State how you learned that he was willing to sell the recipe for the Atwood Bitters.

(Objected to.)

Ans. H. asked my agent if he knew any who wanted to buy a recipe for making Atwood Bitters. He told him he thought I would buy it.

(Plaintiff's counsel moves to strike out the answer as hearsay.)

21. Did you, or not, soon thereafter, purchase from said Atwood said recipe?

(Objected to.)

Ans. I did.

22. Will you look at "Exhibit L," attached to your affidavit filed in this case, and say what it is?

(Objected to.)

Ans. It is a letter I received from him enclosing the recipe.

23. State what, if any, label was sent you by him as the one to be used with the article compounded according to that recipe, and also what form of bottle you were referred to by him.

(Objected to as to form and substance.)

317 Ans. That was the label (referring to label on "Exhibit A, July 14, 1875,") and [he] referred me to the smooth twelve-square bottle, i. e., without any lettering. He called it the eight-ounce prescription bottle.

24. Referring to the form of the bottle, "Exhibit A," by what name was such bottle known, if by any, to the trade?

Ans. Eight-ounce fluted prescription bottle.

25. Will you state in what form of bottle the Bateman Bitters, which you say were then on sale in this State, were put up?

(Objected to.)

Ans. He had one like "Exhibit A, C. S., and also one [like] "Exhibit A, July 14, 1875."

26. Whose son, as you have understood, was Moses F. Atwood?

(Objected to for form and substance.)

Ans. Moses Atwood's.

27. Where had he been residing?

Ans. Georgetown, Mass.

28. Where did he then go to reside?

Ans. He went to Iowa.

29. Was he not, at or about the time of your purchase, settling up for sales of the Atwood's Bitters in the State of Maine?

(Objected to.)

Ans. That was the report he made.

30. Since the date of said sale to you, have you, until the visit of Eli B. Johnson to your store in 1875, ever received any notice to discontinue the preparation and sale of the article or the use of said label and bottle?

(Objected to.)

Ans. No, sir.

318 31. During this time, have you ever received any intimation that any one claimed any exclusive right to the use of the bottle or label, or both, like "Exhibit A, July 14, 1875"?

(Objected to as to form.)

Ans. No, up to the time Johnson was here.

32. Do you remember of Carter, of Georgetown, Mass., visiting your store? If so, when was it?

Ans. He did visit my store, some—well, four or five years ago.

33. Do you know what the name of that person is?

Ans. Luther F. Carter.

34. At the time of his visit, were there in your store articles like "Exhibits A and B"?

(Objected to.)

Ans. I think we had both of them at the time.

35. Did he see them?

(Objected to.)

Ans. I couldn't say that he did or not.

37. Did he say anything at that time concerning your preparation of this article, and was he aware of the same?

(Objected to as to form and substance.)

Ans. He did, and was aware that we manufactured it.

38. Did said Carter say at that time to you that you were so preparing and selling this article against his own rights?

(Objected to as to form and substance.)

Ans. No.

39. Did he make any claim of that character?

(Objected to as to form and substance.)

Ans. No; not in the least.

40. Were you present at the time a person procured in your store from your bookkeeper, Mr. Arvedson, two bottles of the article like "Exhibit A, July 14, 1875"?

Ans. I was.

41. Do you know that person's name and who he was?

Ans. I did not at the time.

319 42. Do you now know who it was?

Ans. I suppose his name was Parker. I have no proof of it except his affidavit and what I have been told.

43. Will you look at the affidavit of said Parker now shown you and say if the time named in his affidavit as the time of his visit to your store corresponds with your recollection of the time when the said person was there?

Ans. It does.

44. At the time of said visit did you sell or have for sale any articles like Exhibit A, July 14, 1875?

Ans. No.

45. How did this person obtain the said two bottles like Exhibit A?

(Objected to.)

Ans. He came in the night before and said he was sick and wanted some bitters of which he had forgotten the name. He addressed himself to Arvedson, and he took him out into the store and showed him some Buzzell's Bitters, and he said they were not the kind. And some of these sat upon the table near by, and Mr. Arvedson took one of them up, and he said that was the kind and he would take half a dozen of them. He said he wanted a bill of them, and Mr. Arvedson gave him one.

46. State what, if anything, took place at a subsequent call of the same person?

(Objected to.)

Ans. The next night just [as] we were closing the shop he came in. I was up in the chamber at the time. I came down. Mr. Arvedson said that the gentleman that was with him wanted him to try them. I told him to give him one. I think he named that the friend was with him. He offered to pay for them, and I told him he was welcome to them

47. What was then done?

Ans. He took the bitters and left.

320 48. Did you at that time intend this transaction as a sale, or how?

(Objected to as to form and substance.)

Ans. I did not consider it as a sale.

49. Were you present at the time of the visit of Eli B. Johnson to your store in the spring of 1875?

Ans. I was.

50. Referring to that part of the conversation at that time about the

bottle like Exhibit A, July 14, 1875, state what said Johnson said concerning the letters blown in the glass of the same.

(Objected to.)

Ans. That we had no right to use them.

51. What, if any, reply did you make to him.

(Objected to.)

Ans. I told him if we had no right to use them we would discontinue. We would look into it.

52. State what, if any, offers said Johnson made to you concerning the sale of your right in these bitters.

(Objected to.)

Ans. He said if we would give up the twelve-square bottle he would buy the mould.

53. What reply did you make?

(Objected to.)

Ans. I told him we would take it into consideration.

55. Did he claim the right to the twelve-square bottle without the letters on the glass?

(Objected to for matters of form and substance.)

Ans. He claimed what he called the right to that style of bottle, lettering, label, and all.

54. Did said Johnson obtain a bottle like Exhibit A from your store at that time? If so, state the circumstances.

Ans. There was a bottle on my desk that I was sitting to, and he wanted [to] know if he could have it, and I said he could. He
321 insisted upon paying for it. I told [him] I should take no pay for it. He insisted upon paying for it, and took out a quarter and threw upon the desk to the bookkeeper.

55. After this visit of Johnson what change in the fluted bottle did you finally determine to make?

(Objected to.)

Ans. If we used it we were going to put our own name upon it—"Atwood's Bitters, prepared by Nathan Wood & Son, Portland, Me."

56. At the time of said Johnson's visit how many bottles put up like Exhibit A were there in the store?

Ans. About six dozen.

57. At the time of your purchase of the recipe, label, &c., from M. F. Atwood what representations were made by him as to the person from whom he learned the method of preparing them?

(Objected to.)

Ans. He said his father gave one of his relatives in New Hampshire, one in Maine, and himself a recipe.

58. What means did you adopt besides advertising of which you have spoken to introduce your bitters to sale?

Ans. We used circulars and posters of various kinds, and had them pasted on buildings [and] shops through the country.

59. Did you or not have traveling agents?

Ans. We had traveling agents and commissioned them to our customers.

60. When you began the sale did you find the article well known throughout the country, or were you compelled to introduce the same yourself?

Ans. They were not generally known in the country. The first year we sold about three hundred dozen; afterwards we sold as high as two thousand.

61. When did you first begin to use the long bottle like Exhibit B?

322 Ans. June, 1861. We commenced the use of this long bottle and a plain fluted bottle.

62. By what name is the long bottle like Exhibit B known?

Ans. Known as a long, eight-ounce, clay-mould, prescription bottle.

63. Will you look at Exhibit N attached to your affidavit and state if it is a circular or notice sent out by the plaintiffs in this case?

Ans. Yes, it is.

64. Will you look at Exhibit H, date Feb. 24, 1875, and state if that is a letter received by your firm from Eli B. Johnson subsequently to this visit to your store herein described?

Ans. It is, and was received subsequent to the last visit.

62. Will you look at the paper now handed you, purporting to be an affidavit of Moses F. Atwood, and state if the same was executed in your presence?

(Objected to.)

Ans. It was.

(The defendant offers the same in evidence to be marked Exhibit 5, Geo. E. B., sp. ex'r.

Admission of exhibit objected to.)

Adjourned until 8.30 a. m. Saturday, April 22, 1876.

66. Why did you also with the fluted use the bottle like Exhibit B?

Ans. The round bottle was called for in the sale.

67. When did you begin to put on to the fluted bottle the blown letters?

Ans. I should think some ten years ago.

323 68. Did or not all of the compounders of these medicines use these words, with the exception, perhaps, of Hay?

Ans. They all use similar words. Perhaps not all precisely the same.

69. Seeing that other manufacturers from different places used these words, what did you consider your rights as to the same?

(Objected to.)

Ans. I considered I had the same rights that the rest had, to use such wording as I pleased.

70. When you purchased the right of Moses F. Atwood did you then know that the article had ever been put up in the bottle like "Exhibit 6, G. E. B., ex'r," now introduced in evidence?

(Objected to.)

Ans. Yes.

71. Were or not those bottles like "Exhibit 6, G. E. B., ex'r," with the label, &c., in circulation in this State at this time?

(Objected to.)

Ans. Yes.

72. At the time of your purchase from Moses Atwood, did you then know that a bottle substantially like Exhibit 6 had ever been used at Georgetown, Mass., to contain these bitters?

(Objected to.)

Ans. No.

73. For how many years, to your knowledge, have the Mystic parties, Bateman and the Carters, been manufacturing and selling their bitters in the market?

Ans. Fifteen years and over, except the Mystic. I have [heard] nothing about the Mystic manufacturing until within a year.

324 74. How were these bitters during this time offered in the market? As Atwood's Bitters, or as the manufactures of Bateman, Carter, &c.?

(Objected to as to form.)

Ans. They were all offered as Atwood's Bitters, manufactured by Bateman, Carter, &c. Carter and Bateman had their name on it; Bateman printed in red ink across the label, Carter's in black ink on the label.

75. State how the article was called for or ordered by the different purchasers. Whether by the title of Atwood's Bitters alone, or whether different purchasers expressed their preferences by the names of the manufacturers.

(Objected to as leading.)

Ans. By the names of the manufacturers, generally.

76. For how many years has that been the case, to your knowledge?

Ans. I should say fifteen years.

76. Look at Defendants' Exhibit 2, G. E. B., and state whether the label is the same as one class of those that have thus been in circulation?

Ans. It is.

77. Would a purchaser, for instance, of the Bateman Bitters with the red letters on the label, have accepted the Exhibit 2 as the same thing, when he [had] been accustomed to purchase the Bateman?

(Objected to.)

Ans. I couldn't say.

78. Were all the bitters sold at uniform prices during these fifteen years?

(Objected to.)

Ans. They were not.

79. Do you know whether the Carter, Bateman, and other bitters were or not in competition in the market during this time?

(Objected to.)

Ans. I could not swear that they were.

(Adjourned until 2.30 p. m.)

325 80. Will you look at Exhibit B, Feb. 14, 1876, and, comparing the same with Exhibit A, state whether, in your opinion, a person having seen both would be likely to mistake the one for the other?

Ans. I shouldn't think they would.

81. What were you informed by Moses F. Atwood as to the identity of your recipe with the one followed by his father?

(Objected to.)

Ans. He said they were the same.

Cross-examination by PHILO CHASE, Esq., counsel for complainants:

82. Is the bottle of bitters, marked Complainants' Exhibit A, July 14, 1875, a bottle of bitters prepared and put up by you?

Ans. Yes.

83. Did you affix to the bottle the label thereon?

Ans. I presume I did.

84. Did you make, or cause to be made, the bottle?

Ans. I did.

85. Did you prepare and put up the bottle of bitters, marked Exhibit B, Feb. 14, 1876?

Ans. I did.

86. Is there any difference between the compound contained in bottle B and that contained in bottle A?

(Objected to.)

Ans. No.

87. Why did you put up the same article in these two different styles of bottles and labels?

(Objected to.)

Ans. The market called for two styles; or rather, say, the trade.

88. Where did the market call for Exhibit A?

326 (Objected to.)

Ans. New Brunswick, Maine, New Hampshire, Massachusetts.

89. Why should purchasers prefer the article with one style of bottle and label rather than the other, if they understood the article was the same?

(Objected to.)

Ans. I presume it was because that particular style was called for by his customers.

90. In choosing one style of bottle and label in preference to the other, must not purchasers have understood there was a difference between the article in one bottle and the article in another bottle?

(Objected to.)

Ans. I couldn't say.

91. Do you think that a person of ordinary intelligence would have any choice if he understood the contents of the two bottles were alike?

(Objected to.)

Ans. I don't know why he should.

92. Do you not then believe that purchasers who preferred one style of bottle and label to the other must have understood there was a difference between the contents of the two bottles?

(Objected to.)

Ans. I couldn't say, I'm sure.

93. How was the article put up as Exhibit A called for in your own trade?

Ans. The fluted bottle—that is to distinguish it.

94. Do you mean that the article was called for as Atwood's Bitters in the fluted bottle?

(Objected to.)

Ans. Atwood's Bitters, fluted bottle, the order would read.

327 95. What proportion of the bitters in the fluted bottle did you sell, as compared with the round bottle, Exhibit B?

Ans. I could not tell.

96. Please state as nearly as you can.

Ans. Perhaps one dozen of the fluted to five dozen of the round.

97. How many of the bitters in the fluted bottle did you ever have on hand at one time?

Ans. I couldn't tell, I'm sure.

98. State according to you' best recollection.

Ans. Well, I might have had fifty gross.

99. Did you not tell Mr. H. H. Hay, soon after this suit was commenced, or about that time, that you had sold only about a gross in all of the fluted bottle kind?

(Objected to.)

Ans. No; nor no other man.

100. Did you tell him anything of that kind?

(Objected to.)

Ans. No.

101. Can you give the names of any dealers in Massachusetts or elsewhere to whom you sold these bitters put up as Exhibit A?

(Objected to.)

Ans. These bitters were commissioned to parties throughout the country. I couldn't tell who the parties were.

102. Give the names and residences of some of these parties to whom you sold the fluted bottle kind.

(Objected to.)

Ans. There are W. F. Phillips & Co., and J. W. Perkins & Co., of this city; Willard & Lane, of Massachusetts; I think E. L. Stanwood, of this city; B. F. Bradbury, of Bangor; I'm not sure, but I think I have sold them to him.

103. Do you recollect any others?

(Objected to.)

328 Ans. S. O. Dunbar, of Massachusetts. I don't recollect of any others.

104. To whom did you first sell the fluted bottle kind?

(Objected to.)

Ans. I couldn't tell.

105. Can you give the name of any person to whom you sold the fluted bottle kind more than a year before Johnson's first visit to your store, about which you have testified?

(Objected to.)

Ans. That is a year from last February. To all the persons or parties, I presume, whom I have named there.

106. What difference, if any, is there between the fluted bottle and label, as used by you, Exhibit A, July 14, 1875, and the bottle and label used by the plaintiff, Exhibit A. Feb. 14, 1875?

Ans. Quite an essential difference in the appearance of the label. The border is different, the printing is not alike, the letters are not the same. I should notice it in a minute. That bottle (Exhibit A, Feb. 14, 1875) had a one-cent stamp on it; the other had a two-cent stamp on it. Exhibit A, July 14, 1875, I bought of the Manhattan Medicine Co. through Mr. Phillips. I should call this last named a spurious bottle of bitters.

107. Is there any difference in the words on the two labels?

Ans. No difference in the reading that I have discovered.

108. What is the difference, if any, in the lettering blown in the glass?

Ans. Mine reads, "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass." This one reads, "Atwood's Jaundice Bitters, Moses Atwood, Georgetown, Mass." When Mr. Atwood gave me the recipe I put in genuine.

(Plaintiff's counsel moves to strike out last sentence of last answer.)

109. If you believed you had the right to use the style 329 of bottle and label, Exhibit A, Feb. 14, 1876, why did you not use the same lettering blown in the glass as well as the same words printed on the label?

(Objected to.)

Ans. I presume I wanted to distinguish mine from theirs so I could tell the difference. I couldn't say what my ideas were when that mould was made, about fifteen years ago.

110. Do you believe that an ordinary purchaser would notice any difference between the labels on Exhibit A, Feb. 14, 1876, and July 14, 1875?

Ans. If he was observing he would; if he bought at hap-hazard he wouldn't.

111. Do you think that the very slight difference in the heaviness of the type of these two labels would put an ordinary purchaser on his guard?

(Objected to.)

Ans. If he was observing I do.

112. Supposing he was ordinarily observing, do you think he would?

(Objected to.)

Ans. If he didn't observe it at all, I think he would buy one as quickly as another.

113. If you intended to sell your article of bitters on its own merits and reputation, and as your own article, why did you not put your own name and place of manufacture on the bottle and label?

Ans. Well, it wasn't customary for any of us to do it in them days.

114. At the time you received the letter attached to your affidavit, marked Exhibit L, purporting to be from Moses F. Atwood, had you ever put up an article of bitters?

(Objected to.)

Ans. Yes.

115. With what style of bottle and label?

Ans. An oval bottle and blue label.

330 116. What were those bitters called?

Ans. Buzzell's Bitters.

117. Have you continued to put up those bitters since?

Ans. I have.

118. Have you ever put up an article of bitters called L. F. Atwood's Bitters?

(Objected to.)

Ans. I never did.

119. Have you any writings of any kind from Moses F. Atwood in respect to said bitters, except this letter attached to your affidavit?

Ans. I have.

121. Where are such writings?

Ans. Among my papers stowed away somewhere.

122. How long have you known this article, Atwood's Physical Jaundice Bitters?

Ans. Some fifteen years; perhaps, sixteen years.

123. Did you know of it when it was put [up] by Moses Atwood at Georgetown, Mass.?

Ans. I have seen the fluted bottle with his name on it, but I couldn't tell who made it.

124. Did you know of the article prior to the year 1855?

(Objected to.)

Ans. I couldn't say.

125. Did you not know of the article as one in the market prior to 1850?

Ans. No.

126. Did you know the article when put up by Moses Atwood in a round bottle with no lettering blown in the glass?

(Objected to.)

Ans. No.

127. Has it not for a long time been well understood in the
331 trade that Moses Atwood first originated the article of Atwood's Bitters, or Atwood's Jaundice Bitters, and the label used on the fluted bottle?

(Objected to.)

Ans. I don't know.

128. Have you not been informed, and do you not believe that Moses Atwood sold the right to these bitters to Carter & Dodge, of Georgetown?

(Objected to.)

Ans. I suppose they did.

129. How long ago were you so informed, and did you so believe?

(Objected to.)

Ans. Perhaps nine months.

130. Were you acquainted with the article after the sale by Moses Atwood, and when it was put up by Carter & Dodge?

(Objected to.)

Ans. I was not.

131. Were you acquainted with it when it was put up by Carter, Dodge & Co.?

(Objected to.)

Ans. No.

132. Did you not understand, when you say you bought the recipe of Moses F. Atwood, that not he but Moses Atwood was the original inventor or compounder of the article?

Ans. I didn't know the history of the article at all when I bought it.

133. Did you not then believe that Moses Atwood was the first inventor and compounder?

(Objected to.)

Ans. I did not.

134. Who did you then believe was the original inventor or compounder of the article?

Ans. I didn't know anything about it.

332 135. Why did you buy the prescription of an article you didn't know anything about?

(Objected to.)

Ans. Because I had calls for the article in my trade.

136. What did you pay Moses F. Atwood for the prescription?

Ans. It was a private trade.

137. What was the trade? I mean what amount in value did you pay him for the prescription, or for whatever you bought *it* from him?

(Objected to.)

Ans. I decline to answer.

138. On what ground do you decline to answer?

Ans. I don't wish to disclose my trades and bargains.

(It is agreed by counsel that the plaintiff may resume the question and the right to make the motion to the court to compel the witness to answer.)

189. Did you take any receipt from Moses F. Atwood for anything you paid him on account of the receipe or prescription?

Ans. I did.

140. Where is that receipt?

Ans. It is amongst my papers somewhere.

141. Will you produce it for this examination?

Ans. If I can find it.

142. When did you last see it?

Ans. I couldn't say—some time ago.

143. Have you seen it since this suit was commenced?

Ans. No.

144. Do you remember how the receipt reads?

(Objected to.)

Ans. I couldn't remember to repeat it; it was fifteen years ago.

145. Have you searched for the receipt since this suit was commenced?

333 Ans. No.

146. How many times did you ever see Moses F. Atwood, prior to the time when you say you bought the recipe or prescription?

(Objected to.)

Ans. I couldn't say.

147. Had you seen him twice?

(Objected to.)

Ans. I think I had.

148. Where?

(Objected to.)

Ans. In this city.

149. Had you bought the prescription at the time you received the letter "Exhibit L," attached to your affidavit?

Ans. I conclude that I had.

150. And had you then paid him for it?

Ans. I think not. I don't remember whether I sent him the money before I received it or not.

151. Did you pay Moses F. Atwood in money, or in something else?

Ans. I paid him the cash.

152. Did you pay it to him in hand or send it to him?

Ans. I sent it to him at Georgetown, Mass.

153. Did you send it to him in a letter?

Ans. I can't remember whether I sent it by mail or express. Probably by express.

154. How much did you send in the letter?

(Objected to.)

Ans. I decline to answer.

155. On what ground do you decline to answer?

Ans. I don't want to disclose the price I paid for the recipe.

(Counsel make some agreement as made to the 138th interrogatory and answer.)

334 156. At the time you say you bought the prescription of this Moses F. Atwood, did he inform you that he was the son of the Moses Atwood whose name appeared on the bottles and labels of Atwood's Bitters?

Ans. I don't recollect that he did.

158. Had Moses F. Atwood ever told you so prior to the time you say you bought the prescription of him?

Ans. I don't recollect that he did.

159. Did you then believe that he was the son of the Moses Atwood whose name appeared on the bottles and labels?

Ans. I couldn't say that I did or did not.

160. Were you informed by this Moses F. Atwood, or by any one else, that he had previously worked for Moses Atwood in putting up the bitters?

Ans. I was not

162. Were you informed, at or previous to your purchase, that said Moses F. Atwood had worked for L. H. Bateman, at Georgetown, in putting up the bitters?

Ans. No.

163. Were you informed by any one that Moses F. Atwood had worked for any one in putting up the bitters?

Ans. Not previous to my purchase.

164. When were you first informed that Moses F. Atwood worked for Moses Atwood or L. H. Bateman in putting up the bitters?

Ans. Since this suit commenced; couldn't say what date, exactly.

165. How did you think Moses F. Atwood came by his knowledge of the prescription you bought?

Ans. He said his father gave it to him.

166. Did you ever have any communication with Moses Atwood in respect to said Bitters?

Ans. I never did.

335 167. Did you take the word of Moses F. Atwood that the prescription which you say he sold you, was the same as that by which Moses Atwood compounded his article?

Ans. I took his word that his father invented it. I didn't know at the time who his father was.

168. Did you ever have the prescription you bought of Moses F. Atwood tested by any physician, to ascertain its effects and value as a medicine?

Ans. No. I have tested it myself on my own person by taking it.

169. Then you have been putting up a preparation for ten years on a prescription which you bought of a boy, have you?

Ans. No, I bought it of a man.

170. How old a man was Moses F. Atwood at the time you bought the prescription of him?

Ans. About twenty-two, by his own statement.

Adjourned until 9 o'clock a. m., Monday, April 24, 1876.

MONDAY, *April* 24, 1876.

171. In your 109th interrogatory you say you wanted to distinguish "your" article from "theirs;" what did you mean by "theirs"?

Ans. I meant the other manufacturers by "theirs." I always distinguished mine as the "Genuine Atwood's Bitters"; that is the article I bought—the Genuine Atwood's Physical Jaundice Bitters—that was the way it read.

(Plaintiffs' counsel moves to strike out all of this answer after the first sentence.)

172. Who do you mean by the other manufacturers?

Ans. I mean all the manufacturers of Atwood's Bitters.

173. Name all the manufacturers of Atwood's Bitters known to you at the time when you began to put them up.

336 Ans. Bateman, H. H. Hay, Mystic, Noyes, Manning & Co., M. Carter & Sons, and all the rest of them. I don't recollect who they were.

174. Whom do you mean by the rest of them?

Ans. I mean all the other manufacturers of Atwood's Bitters.

175. Can you name a single person who put up Atwood's Bitters besides those specified in your last answer?

Ans. Levi F. Atwood, I believe, put them up.

176. Can you name any one else?

Ans. I don't recollect any one.

177. How long had Bateman been putting up the bitters when you began to put them up, so far as you were informed?

Ans. I don't know.

178. How long M. Carter & Son?

Ans. I don't know.

180. How long Noyes & Manning?

Ans. I couldn't say.

181. By Mystic do you mean Noyes & Manning?

Ans. Yes.

182. Has not H. H. Hay always put up his bitters as "L. F. Atwood's"?

Ans. I couldn't say.

183. Have you ever known him ever to put them up except as "L. F. Atwood's"?

Ans. No.

184. Did you ever know Levi F. Atwood to put them up except as "L. F. Atwood's"?

Ans. No.

185. Do you not know, or have you not been informed, that Bateman, Noyes & Manning, Carter & Son, all put up said bitters as the successors of Carter, Dodge & Co., the successors of Moses Atwood?

(Objected to.)

Ans. I know by their affidavits, sworn statements.

337 186. Have you not yourself, in your own affidavit, sworn substantially to the same thing?

(Objected to.)

Ans. Same thing as what? I don't understand the question. (Question read.) I think I did. Something similar. It is all hearsay.

187. Why did you not write to Moses Atwood to ascertain if you had got his genuine prescription?

Ans. I didn't know of such a man.

188. Did you try to find out Moses Atwood?

Ans. I didn't; not at that time.

189. Did you ever write to or try to ascertain from any of the parties putting up Atwood's Bitters, whether you had got the genuine prescription?

(Objected to.)

Ans. To no one but Moses F. Atwood.

190. Did you ever advertise that you put up the bitters in two kinds of bottles, with two styles of labels?

Ans. I notified my customers that I did; not otherwise.

191. Did you ever advertise to the public that you were putting up the bitters in the fluted bottle style?

Ans. I advertised that I was putting up Atwood's Bitters. I don't know that there was ever a fluted or round bottle mentioned.

192. You say Moses F. Atwood referred you to a fluted bottle and label; in what way did he refer you to them?

Ans. He sent me a label in a letter and referred me to a fluted or eight-ounce bottle without any lettering.

193. In what letter did he send the label to you? Is it the letter attached to your affidavit, marked Exhibit L, and dated May 28th?

Ans. I had four or five letters from him. I couldn't state in what letter; it was sent while he was at Georgetown.

194. Have you got any of these letters except Exhibit L?

338 Ans. I have not.

195. When did you look for them?

Ans. When I moved from Deering block to Commercial street, these letters hung on a hook over my desk. Some one took them. This one was in my safe, and was preserved with the recipe.

196. When did you begin to put up the bitters in the round bottle, Exhibit B, and when in the fluted bottle, Exhibit A?

Ans. I think about the same time.

197. Why did you not stick to one kind of bottle and label?

(Objected to.)

Ans. Both kinds were called for by the trade—both styles.

198. Had not Levi F. Atwood and H. H. Hay been previously putting up their article in the round bottle, like Defendant's Exhibit 1, April 3, 1876, as L. F. Atwood's Bitters? (Objected to.) And had you not bought of L. F. Atwood and Hay said article? (Objected to.) And dealt in the same? (Objected to.)

Ans. No; not in the style of bottle you represent, but in the form of Exhibit B, G. E. B. As to dealing in the bitters, I had bought of H. H. Hay, but not of L. F. Atwood.

199. How was Carter aware that you were putting up the bitters?

Ans. He came to my store, and we talked the matter all over in regard to putting up the bitters and the sale of them.

200. Did he not claim that he and the other successors of Carter, Dodge & Co., as the successors of Moses Atwood, had the sole right of putting up the bitters?

Ans. No claim of any kind mentioned.

201. Was any particular style of bottle or label mentioned?

339 Ans. I don't remember that there were.

202. Have you not stated that for some time prior to Johnson's first visit to your store you had substantially ceased to make and sell the bitters with bottle and label like "Exhibit A, July 14, 1875"?

(Objected to.)

Ans. I told Mr. Johnson that we were not selling many of that style at that time.

203. (Question repeated.)

(Objected to.)

Ans. I don't recollect of any conversation of that kind.

204. Have you made no statement of that kind?

Ans. I don't think I made such statement. We had an order for eight gross at that time, and I don't see why I should.

205. Is the statement in your affidavit in the case and before referred to by you, that "I had, before the complainant company became owner of any rights in said medicine, so far succeeded in that effort as to have substantially ceased to put up and sell any bitters in the style of the sample annexed to complainant's bill of complaint," true?

Ans. What I meant by that was that we didn't have so many calls for them. We were selling but very few of them at that time. Massachusetts parties were taking the trade away by selling cheap bitters.

(Plaintiffs' counsel moves to strike out the answer as irresponsive and evasive.)

206. (Question repeated.)

(Objected to, because question has been fully answered.)

Ans. The statement, in view of my explanation, is true.

207. Did you discontinue the sale of the article in the form of Exhibit A, July 14, 1875, because it was unprofitable, or because you had no right to use that form?

(Objected to.)

340 Ans. I discontinued the sale because Mr. Johnson said they had bought the right to that style of bottle and label, and I had stowed the bitters away in a box out of sight.

208. Who besides the Georgetown parties, that is, the successors of Moses Atwood and Carter, Dodge & Co., ever used, so far as you know

or have been informed, the fluted bottle or any fluted bottle and label like Exhibit A, July 14, 1875, or like plaintiffs' bottle, Exhibit A, Feb. 14, 1875?

(Objected to.)

Ans. M. Atwood, of Salem; a Mr. Bouker, of Boston; a man by the name of French. I don't recollect of others.

209. By the M. Atwood kind, do you mean the kind sold by Daniels, of Natick?

A. Yes.

210. Have you not been informed that both Daniels and Bouker are under the injunction of this court for selling bitters?

(Objected to.)

Ans. Yes.

211. How long since you knew French to use such fluted bottle, and what French do you mean, where of?

Ans. When I was in Boston I was told that a Mr. French had put up these bitters in such a bottle, but they did [not] say of what place, or anything about him.

212. Is the article contained in Exhibit H, April 11, 1875, and the article in the bottle marked "C. E. P.," or Pl'ffs' Exhibit 1, June 7, 1875, and the article in Exhibit B, Feb. 14, 1876, the article of bitters made by you, and are they all the same article?

(Objected to.)

Ans. All made by the recipe we had of Moses F. Atwood—all the same.

213. And is the article in Pl'ffs' Exhibit A, July 14, 1875, same thing?

(Objected to.)

341 Ans. Yes.

214. How many bottles of the bitters put up in bottle and label like or similar to Exhibit H have you sold or placed in the market or put up?

(Objected to.)

Ans. Something like seventy-five gross, but I couldn't state the amount. We put up very few like Exhibit H. Most were put up like Exhibit 4, G. E. B.

214. Since what time have you put up, put into the market, and sold the article in this form, i. e., Exhibit H?

Ans. Since last November, I think.

215. Have you looked for the receipt you say you received from Moses F. Atwood?

Ans. I have.

216. Have looked for it?

Ans. I have, and have not completed the search yet. I think I can give a copy of it.

217. Is it the receipt referred to by Moses F. Atwood in his affidavit of Dec. 11, 1875, before offered in evidence by you?

Ans. The receipt for the money paid for the recipe and right to manufacture and sell in his name is the same referred to in the affidavit.

218. Where did you see this affidavit executed?

Ans. In Union, Iowa. I think that was the name of the town. It was where he resides, at any rate.

219. At whose request was the affidavit drawn up and executed?

Ans. Mr. Atwood went and looked the man up who drew it up, and old him what he wanted done.

220. At whose request did Moses F. Atwood go and get the affidavit drawn up?

Ans. We both went together. I presume he went at my request. I couldn't say. I don't recollect all about it.

342 221. Did you talk over with Moses F. Atwood the substance of what should be in the affidavit, before the affidavit was executed?

Ans. Well, I told him I wanted him to give me an affidavit, and state the truth in it just as it was.

222. Did you go to Iowa to get the affidavit?

Ans. Not particularly; I went to see him on other matters.

Direct resumed by Mr. CLIFFORD:

223. You have been asked where the article like Exhibit A, July 14, 1875, was called for. State also where the trade called for the article like Exhibit B, in what parts.

Ans. Mainly in the State of Maine.

224. Was it or not the fact that a portion of the trade called for A and a portion for B?

Ans. It did.

225. Referring to your 106th cross-answer, state whether you notice any difference in the appearance of [the] two, so far as the appearance of the contents are concerned, and what that difference in the appearance, if any, indicates.

(Objected to.)

Ans. It indicates that "Exhibit A, Feb. 14, 1875, W. J. M.," is a spurious article.

226. Why do you class Exhibit A, Feb, 14, 1875, W. J. M., as spurious? Give your reasons.

(Objected to,)

Ans. The genuine article can't be made that color.

228. Will you now look at Defendants' Exhibit 2, G. E. B., with the plaintiffs' proprietary stamp thereon, and comparing that with Exhibit A, July 14, 1875, state whether these two articles, so far as the appearance of contents is concerned, appear to be genuine?

(Objected to.)

343 Ans. I shouldn't judge that it had the full amount of medicine in the receipt of genuine article. The label goes to the top of the bottle.

229. Will you compare Exhibit A, Feb. 14, 1876, and Defendants' Exhibit 2, G. E. B., and state from your knowledge of this article which is the better of the two compounds?

(Objected to.)

Ans. I should judge that Exhibit 2 was the best by considerable.

Adjourned until 2.30 p. m.

MONDAY *April* 24—2.30 p. m.

Adjourned until Tuesday morning, at 9 o'clock a. m.

TUESDAY, *April* 25, 1876—9 o'clock a. m.

230. Will you compare Exhibits B, Feb. 14, 1876, and Exhibit 1, April 3, 1876, and state whether the contents of the two are, in your opinion, the same, and are of an equal grade?

(Objected to.)

Ans. I should judge they were.

231. Will you state what, in your opinion, is the cause of the differ-

ence in appearance between Exhibit 2, G. E. B., and Exhibit A, Feb. 14, 1876, W. J. M.?

(Objected to.)

Ans. One is not Atwood's Bitters, and the other Exhibit 2, G. E. B., is. I don't know that I can state the cause of the difference.

344 232. Will you now look at Exhibit 10, G. E. B., April 25, 1876, and state whether that is a style of bottle and label lately used by your firm?

Ans. Yes.

233. Will you look at Exhibit 7, G. E. B., and state by whom that is or was lately used, and what the bottle contained?

(Objected to.)

Ans. The article was put up by Moses Atwood, as I am informed. I didn't have it of Moses Atwood. I obtained it from his son at Union, Iowa; his son, Moses F. Atwood.

(These two Exhibits, 10 and 7, G. E. B., are hereby introduced in evidence.)

234. Would any person having a knowledge of this article of bitters, in your opinion, fail to detect the difference between Exhibit 2 and Exhibit A, Feb. 14, 1876?

(Objected to.)

Ans. I should judge they wouldn't, if they compared them.

235. In your 205th cross, did you mean to say anything more than that you had substantially given up the sale of one style of label and bottle, to wit, like Exhibit A?

(Objected to for form.)

Ans. That was all.

236. Were the cheap bitters referred to in that answer put up in the style of Exhibit A?

Ans. Yes.

Cross-examination resumed, by Mr. CHASE:

237. Do you know the ingredients composing Exhibit A, Feb. 14, 1876?

Ans. I do not. I judge from the appearance of the article.

345 238. If you do not know the ingredients of the article, how can you call it spurious?

Ans. Because the pure Atwood's Bitters cannot be made of that color and appearance.

239. How do you know they cannot be made of this color?

Ans. By my experience in manufacturing the article.

240. Did you ever use any recipe for making the bitters except the one you got from Moses F. Atwood?

Ans. Not for Atwood's Bitters.

241. Did you ever try any other formula for making Atwood's Bitters?

Ans. No.

242. Do you know the formula by which the plaintiffs' bitters are made?

Ans. It purports to be made from Moses Atwood's formula.

243. (Question repeated.)

Ans. I don't.

244. Did you ever taste the article Exhibit A, Feb. 14, 1876, or try it in any manner, to try its quality or effects?

Ans. I never did; but I have tasted an article which had every appearance of it, in the same style of bottle and label.

245. Did you ever know the ingredients composing what you call the cheap Atwood's Bitters?

Ans. I never did.

246. If you do not know the ingredients of Exhibit A, Feb. 14, 1876, how can you say——

(Question withdrawn.)

NATHAN WOOD.

Subscribed and sworn to before me.

GEO. E. BIRD, *Sp. Ex'r.*

346 *Deposition of Reuben L. Richardson.*

REUBEN L. RICHARDSON, of Boston, being called by the defendant, and by me duly sworn according to law, testifies as follows:

Examined by Mr. CLIFFORD:

1. Give your name, age, residence, and business.

Ans. Reuben L. Richardson; age 26; residence, Belmont, Mass.; business, clerk in wholesale druggist store in Boston.

2. How long have you been employed in the business of druggist?

Ans. A little over ten years.

3. With whom have you been employed during that time?

Ans. Rust Brothers & Bird.

4. Where is their place of business?

Ans. 43 Hanover street, Boston.

5. Do they or not deal in what is generally known as patent medicines?

Ans. They do.

6. Have they so dealt since you have been with them?

Ans. They have.

7. Have your employers, since you have been with them, dealt in an article the label and bottle of which was substantially like Ex. A, now handed you?

Ans. They have.

8. Have they ever, to your knowledge, sold any like Ex. C?

Ans. There is slight difference in the bottle. Can't say but it is substantially like Ex. A.

9. Have you ever seen anything, since you have been connected with the business, like Ex. F?

Ans. I have not.

347 10. Of whom did your firm purchase the articles substantially like A and C?

Ans. Charles E. French, drug broker, Boston.

11. Did your firm deal in an article where there was a label employed like the one now shown you, attached to the 86th answer of the deposition of Luther F. Carter?

Ans. They did.

12. What was the customary price per gross of the article having on it such a label?

(Objected to.)

Ans. $27 per gross.

13. Will you state how that article was esteemed in the trade, and whether it was considered a genuine article or not?

(Objected to.)

Ans. It was esteemed as the genuine Atwood's Bitters.

14. What was the price per gross of the article which you bought and dealt in, having the label like "Exhibit A"?

(Objected to.)

Ans. $16.50 per gross.

15. How was that article known and esteemed in the trade? As genuine, or otherwise?

(Objected to.)

Ans. It was considered an imitation bitters.

16. Was, or not, its character well understood by you and in the trade?

(Objected to as to form and substance.)

Ans. It was.

17. For how many years was this imitation bitter' put on to the market under the label substantially like Exhibit A?

Ans. I should say six or seven years.

18. Did you buy both of these kinds from French, the drug broker?

Ans. We did not.

348 19. Which did you buy of him?

Ans. The imitation.

20. If it was generally understood in the trade who put up the imitation bitter', will you state by whom it was understood to be put up?

(Objected to.)

Ans. Moses Carter & Son, of Georgetown.

21. Will you state what experience you have had of the imitation article like Exhibit A, as to its remaining in a sound condition while in your hands? State fully.

(Objected to.)

Ans. We, during this period since we have handled it, at different time we have had it burst, become sour from fermentation, rendering it unfit for sale, so that we had to have it returned.

22. What effect did the fermentation and souring have, if any, on the corks of the bottles?

(Objected to.)

Ans. Caused them to be blown out.

23. To whom did you return the bitters under such circumstances?

(Objected to.)

Ans. We would notify Mr. French, of whom we purchased them, and he would see that they were exchanged for better.

24. Did any fermentation and bursting ever take place with what you understood to be the genuine article?

(Objected to.)

Ans. Not to my knowledge.

25. Would what you call the imitation article keep when exposed to the rays of the sun for any considerable time?

(Objected to.)

Ans. It would not, in my opinion.

349 26. Running over the six or seven years of which you have spoken, can you give some idea of the frequency of the spoiling of the imitation bitter', as you have described, by fermentation?

(Objected to.)

Ans. No, I can't tell how many times, but I know it has happened frequently during that period.

27. Of which should you judge, of your knowledge, was the largest amount put into the market of these two, the imitation and the genuine brand?

(Objected to as to form and substance.)

Ans. The imitation.

28. By what title were what you call the genine article bought and sold in the market?

Ans. Carter's Atwood's Bitters.

29. Have you ever dealt in any put up like Ex. 1 and Ex. B?

Ans. We have bought the one like Ex. 1 in case our customers ordered it, although we did not carry it in stock, but the one like Ex. B we have never handled, to my knowledge.

30. Have you ever dealt in an article like Ex. A, except it had the name L. H. Bateman on the label?

Ans. Not to carry them in stock; only to purchase at request of customers.

31. When thus requested by customers to purchase either of these two kinds, the Carter or the Bateman, please state how the customer called for them; by what name.

Ans. He would say Bateman's Atwood's Bitters; or, if he wanted the genuine, he would say Carter's.; or, if he wanted the L. F. Atwood, he would specify L. F. Atwood.

Cross-examination by Mr. CHASE:

1. How long have you been in the employ of Rust Brothers & Bird?

Ans. A little over ten years.

350 2. What have been your duties as employee of that firm during the time you have been with them?

Ans. At first I was a want boy—sent out to buy articles we had not in the stock; then I was put on the packing bench, putting up orders; then I was taken into the office, and did general office work, such as collecting, &c.; since then have gradually worked into a salesman, and generally looking over the goods in the store and after them.

3. How long since you became salesman?

Ans. Can't state; have gradually worked into the position.

4. State how long according to your best recollection since you became salesman.

Ans. It may be five or six years.

5. How long since you were promoted from want boy to office clerk?

Ans. I couldn't tell.

6. Have Rust Brothers & Bird sold Atwood's Bitters all the time you have been with them?

Ans. As far as my knowledge extends, they have.

7. Do you know of your own knowledge that Rust Brothers & Bird have sold Atwood's Bitters during all the time you have been with them?

Ans. The first two years of my being there, or thereabout, I couldn't tell of my own knowledge; since, I do know. The term Atwood's Bitters is a little indefinite; before selling, we should ask our customers what kind of Atwood's Bitters he wanted.

8. Of whom did Rust Brothers & Bird buy Atwood's Bitters the first year of your having knowledge that they sold them?

Ans. Charles E. French and Moses Carter & Son.

9. Have Rust Brothers & Bird ever bought Atwood's Bitters of anybody except Charles E. French and Moses Carter & Son? If so, of whom, and when?

351 Ans. We have bought the L. F. Atwood's Bitters and the Bateman for customers at different times in small quantities, but not to carry them in stock. All the rest we bought of French and Carter & Son, to the best of my knowledge.

10. Who is Charles E. French?

Ans. A drug broker.

11. Which kind did you buy of French?

Ans. The kind like Ex. A, with the Moses Atwood label, similar to that.

12. How long have Rust Brothers & Bird sold Atwood's Bitters bottled and labeled similar to Ex. A?

Ans. Should say six or seven years.

13. Do you know by whom Atwood's Bitters, put up in the style of Ex. A, has been manufactured since Rust Brothers & Bird have dealt in it?

Ans. I do not.

14. Have you any knowledge as to by whom or where they were manufactured?

Ans. I have not.

15. Do Rust Brothers & Bird now deal in Atwood's Bitters put up in the manner of Ex. A?

Ans. I should say that is the same style.

16. Of whom do they purchase it?

(Ojected to.)

Ans. Geo. C. Goodwin & Co.

17. Are Geo. C. Goodwin & Co. jobbers?

(Objected to.)

Ans. They are in that line of medicines, patent medicines.

18. Are not Geo. C. Goodwin & Co. supposed to purchase direct from the manufacturer?

Ans. They are. I should say from the manufacturer's agents, John F. Henry, Curran & Co., New York.

19. Who are John F. Henry, Curran & Co.?

352 Ans. They are a firm doing a wholesale drug and patent medicine business in New York, and the manufacturer's agents for the sale of these bitters.

20. How long have Rust Brothers & Bird obtained their supplies of Atwood's Bitters through Geo. C. Goodwin & Co., as you have above stated?

(Objected to.)

Ans. About a month or six weeks ago we bought a gross to carry us along; this was the first.

21. Are these Atwood's Bitters purchased through Geo. C. Goodwin & Co. considered imitation bitters?

(Objected to.)

Ans. They are not.

22. Are they considered in the trade as the genuine Atwood's Bitters?

(Objected to.)

Ans. They are.

23. How long since Rust Brothers & Bird sold what you, in your direct examination, called an imitation?

Ans. I can't state how long.

24. State as nearly as you can the time.

Ans. I can't tell how long it is; I cannot say.

25. (Question repeated.)

Ans. It may have been nine months or fifteen months; from nine to fifteen months.

26. Did you personally ever sell any of said Atwood's Bitters which you call the imitation; and, if so, how much and how often have you sold it?

Ans. I have sold them, not on my own account, but on account of the firm. Can't tell how much or how often.

27. Did you inform the customer or customers to whom you sold what you call an imitation article, that you were selling him or them an imitation of Atwood's Bitters?

(Objected to.)

Ans. I did not as a general thing, because it was understood.

353 28. Did you sell the article which you call the imitation to consumers?

Ans. Not to my knowledge.

29. To whom did you sell what you call the imitation?

Ans. To retail dealers generally.

30. Are Rust Brothers & Bird in the habit of dealing in imitation medicines?

(Objected to.)

Ans. I don't think I will answer that.

31. On what ground do you decline to answer the last question?

(Objected to.)

Ans. Because it would criminate myself.

32. Did Rust Brothers & Bird make any difference in price to their retail customers between what you call the imitation Atwood's Bitters and the Atwood's Bitters prepared by Carter & Son?

(Objected to.)

Ans. They did.

33. What difference?

(Objected to.)

Ans. The same difference any dealer would between an article costing $16.50 and an article costing $27.00.

34. Can you answer the 33d X-int. any more definitely?

(Objected to.)

Ans. I should not change my previous answer.

35. In all your experience in the drug and medicine business, did you ever know or hear of anybody's buying an imitation medicine or drug for his own consumption, knowing it to be an imitation medicine or drug?

(Objected to.)

Ans. I can't say that I remember any such thing.

36. Do you know by whom the article which you call the imitation Atwood's Bitters were manufactured?

Ans. I do not.

354 37. Whom did you ever hear call the article which you speak of as the imitation an imitation; designate the particular persons?

A. I cannot designate any particular person.

38. Can you name a single person you ever heard call the article an imitation except Mr. Clifford, defendant's counsel.

(Objected to.)

Ans. I never heard anybody. Don't remember hearing Mr. Clifford call it so.

39. Now, was not the article which you and defendants' counsel have characterized as an imitation Atwood's Bitters an Atwood's Bitters of a lower and inferior grade, rather than an imitation?

Ans. I think it was a lower grade and an imitation both.

40. Would you call an inferior grade of an article put up and sold by the same manufacturer as the superior grade, with the same trade-marks, an imitation of the superior grade?

A. I should call it an imitation, by qualifying as to what it was.

41. And is this what you mean by imitation where you have applied the term to Atwood's Bitters in this examination?

Ans. Not fully.

42. Then state fully what you mean by the term imitation when you apply it to a certain grade or quality of Atwood's Bitters formerly sold by Rust Brothers & Bird?

Ans. It is a bitter' put up without particular regard to the quality of the same, to be sold upon the merits of the general style of the bottle?

43. And is this all you mean?

Ans. I don't know as I can answer that any more fully.

44. Suppose a customer calls on you for Atwood's Bitters, what do you hand him?

355 (Objected to.)

Ans. I shouldn't hand him anything till I asked him which he wanted. It would depend upon which he wanted.

45. Do you now keep in your stock any other kinds of Atwood's Bitters than those purchased of the plaintiffs' manufacture through Geo. C. Goodwin & Co.?

(Objected to.)

Ans. We do.

46. What kinds?

(Objected to.)

Ans. We have sold a kind, such as plaintiffs' Ex. "H," April 11, 1876, now shown me. There is an Atwood's Quinine Tonic Bitters that we sell. That is all I know of.

47. How long have Rust Brothers & Bird sold Atwood's Bitters bottled and labeled like Ex. "H?"

(Objected to.)

Ans. I could not say.

48. State as near as you can.

(Objected to.)

Ans. I should say about three months, at a guess.

49. From whom do Rust Brothers & Bird obtain their supplies of the bitters put up like Ex. "H"?

(Objected to.)

Ans. Weeks & Potter, of Boston.

50. How many, as nearly as you can state, of the bitters like Ex. "H," sold?

(Objected to.)

Ans. I decline to answer.

51. On what grounds do you decline to answer the last question?

(Objected to.)

Ans. Because I should be betraying the confidence of the house.

52. How much of Ex. "H," as nearly as you can state, have Rust Brothers & Bird now on hand?

356 (Objected to.)

Ans. I decline to answer for the same reasons as before.

53. Have you not been informed that the bitters put up in the style of Ex. "H," are manufactured by Nathan Wood & Son., of Portland, Me.?

(Objected to.)

Ans. I have been informed by hearsay.

54. When were you first informed by hearsay, that Nathan Wood & Son put up the article Ex. "H"?

(Objected to.)

Ans. Inside of two weeks I got an inkling of it.

55. Have you been informed that there was an injunction in this suit against Nathan Wood & Son?

(Objected to.)

Ans. I have not.

56. Suppose a customer should inquire for Atwood's Jaundice Bitters, or Atwood's Vegetable Physical Jaundice Bitters, what would you hand him?

(Objected to.)

Ans. I should ask him which kind he wanted.

57. And by that, would you mean to ask him whether he wanted the plaintiffs' article Ex. "A" or Ex. "H"?

(Objected to.)

Ans. I should.

58. Now, suppose you never had had any of Ex. "H," and a customer should ask for Atwood's Jaundice Bitters, or Atwood's Vegetable Physical Jaundice Bitters, what would you hand him?

Ans. I should hand him anything I had in the stock called Atwood's Jaundice Bitters.

59. You say that your employers bought Atwood's Bitters of Carter & Son, of Georgetown, Mass., with a label on the bottles like the label attached to 86th direct int. of Luther F. Carter's deposition.

357 Did you not understand that Carter & Son's had the right to the trade-marks of the medicine put up in that manner?

(Objected to.)

Ans. I always supposed they did.

60. If you understood that Carter & Son put up the weakened Atwood's Bitters purchased through the broker French, did you understand that Carter & Son had the right to use the trade-marks on that bottle?

(Objected to.)

Ans. I didn't know whether they had the right or not.

61. Was there any difference in the bottle of the Atwood's Bitters which you bought through the broker French and those you bought from Carter & Son?

Ans. There was a difference in the bottle—difference in the name blown in the glass of the bottle.

62. What was that difference?

Ans. I don't remember.

63. Was there any difference in the labels; if so, what?

Ans. One was like label annexed to 86th int. of Luther F. Carter's deposition, and the other like Ex. "A."

64. When, and in what quantities did Rust Brothers & Bird buy Atwood's Bitters of French?

Ans. I cannot give any dates.

65. State as nearly as you can.

Ans. I cannot.

66. How is plaintiffs' article, Exhibit "A," known and called in the trade?

(Objected to.)

Ans. Atwood's Bitters—Henry's; that is, so far as my experience goes at the present time.

67. By whom have you ever heard them so called?

Ans. I could not specify any particular person.

68. Will you swear that you ever heard them so called by any person?

Ans. I have heard them called by that name.

358 69. Did you ever hear them called by that name outside of your own store?

Ans. Yes, sir.

70. Did you ever hear them so called outside of your own store as many as five times?

Ans. I can't say whether I have or not.

Chief resumed:

32. At the time previous to the purchase by the Manhattan Medicine Co., when Bateman's, Carter's genuine and imitation, and the other brands were in the market together, were or not they bought and sold by different names for a period of years?

(Objected to as to form and substance.)

Ans. They were, the L. F. Atwood's, the Bateman's, Carter's, Atwood's, Moses Atwood's. Don't remember any others.

Cross resumed:

71. What was the difference between the style of bottle and label used by Bateman and those used by Carter & Son?

Ans. I cannot state specifically the difference, but if I remember right, the name of L. H. Bateman was written across the label.

72. Do you know, or did you ever know under what right or claim Bateman put up Atwood's Bitters in said style?

Ans. I do not, and never did.

73. Do you know under what claim or right Carter's Bitters were put up in the manner they were?

Ans. I do not.

359 74. Was it not well understood in the trade that somebody had the right to the trade-marks, that is, the peculiar style of bottle and label of Atwood's Bitters?

(Objected to.)

Ans. I think not, so far as my observation goes.

75. If somebody did not have the right to the trade-marks, why did not Rust Brothers & Bird and other dealers, put up the article themselves and use these trade-marks?

(Objected to.)

Ans. I don't know.

76. Did you ever know anybody to use these trade-marks except Carter & Son, and Bateman?

(Objected to.)

Ans. Only from finding other goods on the market.

77. What other goods on the market do you refer to?

(Objected to.)

Ans. The L. F. Atwood's; that is all that I can place, were on the market, but saw some in the store of Dr. H. L. Bowker & Co., on Broad street, Boston. Whether these last were offered for sale, I don't know.

78. Have you or not heard that the Bowker Bitters were enjoined by the U. S. circuit court?

Ans. I cannot say that I heard so, but understood that they had been stopped from making them by some process or other.

79. Do you or not think that dealers would put up their own bitters if they could do so, and use the same trade-marks instead of buying of the manufacturers and paying $27 a gross?

(Objected to.)

Ans. I don't think they would if the parties had to fight it so much, whether right or wrong.

(Last part objected to by plaintiffs as irresponsive.)

REUBEN L. RICHARDSON.

360 *Deposition of Frank B. Webster.*

Examination of FRANK B. WEBSTER, by Mr. CLIFFORD, called by defendants:

1. State your name, age, residence, and business.

Ans. Frank B. Webster; age, 47; residence, Boston; business, jobbing in patent business.

2. With what firm are you?

Ans. Geo. C. Goodwin & Co.

3. Are they or not agents of the Manhattan Medicine Co. for the sale of an article substantially like Ex. "A"?

Ans. We buy and sell it; that is all the agents we are.

4. Has your firm ever bought of M. Carter & Son, Georgetown, Mass., an article substantially like Ex. "A," with the same label, for about $16 per gross?

(Objected to.)

Ans. We have.

5. Have you bought them of any broker in Boston; if so, whom?

(Objected to.)

Ans. We have, of Charles E. French.

6. Over how many years have your purchases from both extended?

(Objected to.)

Ans. Bought of Mr. Carter some fifteen years, and of French two or three years.

7. Was or not this $16 article generally known and sold in the trade?

(Objected to.)

Ans. I think it was.

8. State whether you have had any of those returned to you for unsoundness?

(Objected to.)

Ans. I think in two or three cases we have had them returned. They said they were sour.

361 9. State if Carter also put up another form, and state as to the price, and the difference, if any, in the label.

(Objected to.)

Ans. He put up same style bitters, I should say, aside from putting his name upon the label. Those were $27 per gross; label like one attached to Luther F. Carter's 86th answer in his deposition.

10. When these cheaper bitters were first put upon the market, was it known by whom they were prepared?

(Objected to.)

Ans. It might have been known by somebody, but not by our firm.

11. Did you try to find out?

(Objected to.)

Ans. We made some inquiries.

12. Could you ascertain?

(Objected to.)

Ans. We could not for a few years.

13. State what, if anything, Carter admitted to you about the putting up of the bitters at a later time, when you were buying this kind of him, Carter?

(Objected to.)

Ans. He admitted he would put up a cheaper bitters than the $27 bitters, which he would sell us for same price that we had been buying of the broker.

14. Did he or not admit that the bitters which had been for a few years sold in the market, of the manufacture of which you were ignorant, were put up by him or his firm?

(Objected to as to form and substance.)

Ans. Don't know as he admitted it in those words, but I got the impression that he did from what he said.

15. You have stated that the $16 article which you bought was substantially like Ex. "A." Do you mean as to the quality of the medicine contained, or only in the bottle, label, &c.?

362 (Objected to.)

Ans. Don't know but the $16 article were all alike, so far as I know.

Cross-examination by Mr. CHASE:

1. How long has the firm of Geo. C. Goodwin & Co. bought and sold Atwood's Bitters?

Ans. Fifteen years, certain.

2. How long have you been connected with the firm of Geo. C. Goodwin & Co.?

Ans. About twenty years.

3. Have not Geo. C. Goodwin & Co. bought and sold Atwood's Bitters for all of the twenty years that you have been connected with the house?

Ans. I can't say; for the first five years I was not in the department of buying and selling; I was in the manufacturing department.

4. Have not Geo. C. Goodwin & Co. bought and sold Atwood's Bitters ever since you have had knowledge of the buying and selling department?

Ans. I think they have.

5. Of whom have they bought their supplies of Atwood's Bitters, from the time you have knowledge of their dealing in the article?

Ans. Mostly from Carter, and from Bateman, of Georgetown. Have bought some of Mystic parties, made by Manning & Noyes. Also of the broker.

6. Do you mean by the broker, Mr. Charles E. French?

Ans. Yes.

7. State, as nearly as you can, the extent of the annual sales of the house of Geo. C. Goodwin & Co., of Atwood's Bitters?

(Objected to.)

363 Ans. It would be guess-work. Say from 200 to 300 gross.

8. Since the business of making Atwood's Bitters passed into the hands of the plaintiff of whom has your house bought its supplies of Atwood's Bitters?

Ans. John F. Henry, Curran & Co.

9. Is not the article of Atwood's Bitters referred to *you* by you a well-known article of medicine in the trade?

(Objected to.)

Ans. I think it is.

10. How long have you had knowledge of its being a well-known article in the trade?

(Objected to.)

Ans. I think ever since we have been dealing in it.

11. By the the term Atwood's Bitters, do you mean the article labeled and bottled in the manner of Ex. "A"?

(Objected to.)

Ans. I do.

12. Then a customer calls on you for Atwood's Bitters, or Atwood's Jaundice Bitters, what do you hand him?

(Objected to.)

Ans. At this time should give him those manufactured by the New York company.

13. What would you have handed the customer before the New York company began to make Atwood's Bitters?

Ans. If we had them in stock that we bought of Bateman, or the broker, we should give him either. It wouldn't make any difference.

14. Did you ever sell, to your knowledge, any of Atwood's Bitters except those put up by Carter & Son, Bateman, and Noyes & Manning, of the Mystic, and the Manhattan Medicine Co.?

Ans. Nobody, except some time ago we bought of Benj. S. Dodge, of Georgetown. We sell a very few of those called L. F. Atwood's, of Portland.

364 15. Suppose an inexperienced dealer, calling for Atwood's Bitters, meaning the plaintiff's article, having seen them advertised or heard them recommended, but not being particularly acquainted with the exact style of label and bottle, and being shown defendants' article, Ex. "B," bearing the same, or nearly the same name, to wit: Atwood's Genuine Vegetable Physical Jaundice Bitters, would he not be likely to be deceived into purchasing the defendants' article for the plaintiffs'?

(Objected to.)

Ans. I should think he would be very liable to, being wholly inexperienced.

X. 16. Would not a customer desiring to purchase Atwood's Bitters, meaning the plaintiff's article, having seen the article advertised or heard it recommended, and not being particularly acquainted with the style of label and bottle, and asking the dealer for Atwood's Bitters, and being shown defendants' article, Ex. "B," be likely to be deceived into purchasing the defendants' article for the plaintiffs'?

(Objected to.)

Ans. I suppose he would be liable.

F. B. WEBSTER.

Deposition of Charles E. French.

Examination of CHARLES E. FRENCH by Mr. CLIFFORD.

1. Give your name, age, residence, and occupation.

Ans. Charles E. French; age, thirty-eight; residence, Boston; occupation, drug broker.

365 2. Have you ever sold an article put up substantially like Ex. "A"? I refer to form of the bottle, label, and the principal words on them.

Ans. I have. I cannot say as to the wording.

3. Did the article have the words Atwood's Vegetable Physical Jaundice Bitters?

Ans. I cannot say.

4. Did you or not know, and do you or not know that the article to which you refer, as sold by you, was Atwood's Bitters?

(Objected to as to form and substance.)

Ans. They were sold as Atwood's Bitters.

5. Of whom did you buy them?

(Objected to.)

Ans. Some two years ago or more Mr. Wiley, of Carter & Wiley, re-

quested me to sell bitters for them, and these are the bitters I sold. I didn't buy them.

6. Where were Carter & Wiley doing business? What were their given names, and what was the nature of their business?

Ans. In Boston. Solomon Carter, Abraham S. Wiley, I think. They were druggists.

7. Is the firm still in existence?

Ans. It is not.

8. If changed, what is the present firm name?

Ans. Carter, Harris & Hawley.

9. Where is their place of business?

Ans. Next to Weeks & Potter, on Washington street.

10. At what price per gross did you sell those bitters?

(Objected to.)

Ans. At various prices. As near as I can remember from $16 to $23 per gross.

11. By whom were these bitters prepared or put up?

(Objected to.)

Ans. I have seen a bill of one lot of bitters from M. Carter & Son to said firm or their successors.

366 12. What was the price of those bitters per gross which you thus saw?

(Objected to.)

Ans. I don't know.

13. You sold some, did you not, to Rust Brothers & Bird, of Boston?

(Objected to as to form and substance.)

Ans. I did.

14. Was it or not for some time a secret or a matter not generally known, by whom the lowest priced bitters, the $16 ones, were put up?

(Objected to as to form and substance.)

Ans. I don't see as I can understand how to answer that, as they were all the same bitters, so far as I know.

15. Was it known for a time by whom the bitters, all or any of them of which you have spoken, were prepared or put up?

(Objected to as to form and substance.)

Ans. Not to my knowledge, except the one lot before referred to.

16. How long was it before it became known in the trade by whom the bitters of which you have spoken were put up?

(Objected to as to form and substance.)

Ans. To my knowledge it was never so known.

17. Have you any further knowledge by whom the bitters of which you have spoken were put up, except what is contained in your 11th answer?

(Objected to.)

Ans. I have seen bills of lading from a certain railroad, without the shipper's name. I remember nothing else.

18. Where was that lot shipped from?

(Objected to.)

Ans. I don't remember.

19. To whom?

(Objected to.)

367 Ans. To the parties aforesaid, or to order, am not certain which.

20. Whom do you mean by the aforesaid parties?

(Objected to.)

Ans. Carter & Wiley and their successors.

21. Have you given all the information you possess at this time as to who put up the bitters of which you have spoken?

(Objected to.)

Ans. All that I remember.

22. Is it or not now known in the trade that the $16 bitters was put up by M. Carter & Son?

(Objected to as to form and substance.)

Ans. I don't know.

23. Do you or not know that they were put up at Georgetown, Mass.?

(Objected to as to form and substance.)

Ans. I do not know.

24. Did or not the labels of the bottles, or both, have on them the words Georgetown, Mass.?

(Objected to as to form and substance.)

Ans. I think a part, if not all, did.

25. Do you know by whom the $22 bitters was put up?

(Objected to.)

Ans. I only know what I stated about the one lot referred to.

26. Will you state whether the $22 bitters had on the labels or bottles or circulars the name L. H. Bateman?

Ans. Not to my knowledge.

27. Were or not some of the bitters which were sold by you to Rust Brothers & Bird returned as unsound by them?

(Objected to.)

Ans. Not to my knowledge.

368 Cross-examination by Mr. CHASE:

1. In your answer to the 25th direct question you state that your knowledge is limited to the one lot referred to; do you mean by this the lot shipped to Carter & Wiley?

Ans. I received the papers from Carter, Harris & Hawley. This is the lot I refer to in former questions 11th and 25th.

2. Is all your knowledge of the Atwood's Bitters to which you have testified in your direct examination, limited to the one lot of bitters referred to by you in your answer to the 11th direct interrogatory?

Ans. It is, so far as the origin is concerned.

3. Among the Atwood's Bitters sold by you, did you sell an article labeled and called Atwood's Bitters, or Atwood's Vegetable Physical Jaundice Bitters, put up by Horace L. Bowker, of Boston?

Ans. Not to my knowledge.

4. Were you employed by Bowker to sell an article called Atwood's Bitters, or Atwood's Vegetable Physical Jaundice Bitters?

Ans. I was not.

5. Did you sell any article of Atwood's Bitters which you were or have been at any time informed were put up by said Bowker?

Ans. I did not.

6. Have you ever seen the article said to have been put [up] by said Bowker, called Atwood's Vegetable Physical Jaundice Bitters?

(Objected to.)

Ans. I cannot say.

7. Have you ever been employed by any one to sell the article called Atwood's Bitters put up by said Bowker, or Bowker & Co.?

(Objected to.)

Ans. I don't know.

369 8. Can you answer the last question affirmatively or negatively according to the fact, by refreshing your recollection?

(Objected to.)

Ans. I cannot.

9. Do you mean to be understood to say that you never did sell an article called Atwood's Bitters put up by said Bowker or Bowker & Co.?

Ans. Not to my knowledge.

10. Will you swear that you have not sold an article called Atwood's Bitters which you at any time were informed were put up by said Bowker or Bowker & Co.?

Ans. I will.

11. Have you not been informed that said Bowker was under injunction for selling an imitation or counterfeit Atwood's Bitters?

(Objected to.)

Ans. Not to my knowledge.

12. Have you sold an imitation Atwood's Bitters put up by S. C. Daniels, of Natick, Mass.?

(Objected to.)

Ans. I have sold Atwood's Bitters which I understood were manufactured by said Daniels, but said bitters were, at my suggestion, returned to the source from which I obtained them.

13. Did you sell any of said Daniels' Bitters, which were not so returned?

(Objected to.)

Ans. I sold others which were never delivered.

14. Did you sell or cause to be sold and delivered any of Daniels' said bitters which were not returned to Daniels?

(Objected to.)

Ans. I did not.

15. Why did you suggest that the imitation Atwood's Bitters put up by Daniels and sold by you should be returned to the source from which they came?

370 (Objected to.)

Ans. On account of a suit which was then pending, and an injunction served on me to restrain the sale.

16. By whom were you employed to sell the said Daniels' article?

(Objected to.)

Ans. By Smith, Doolittle & Smith, of Boston.

17. Do you know whether Smith, Doolittle & Smith sold any of Daniels' articles?

(Objected to.)

Ans. I understood that they did.

18. Did either of said firm, if so, which one, tell you they had sold said Daniels' Bitters?

(Objected to.)

Ans. As far as I remember Mr. Doolittle told me so.

19. What did he tell you in respect to the sale of Daniels' Bitters by them?

(Objected to.)

Ans. I did not then know them as Daniels' Bitters. He told me he had bitters from a party who had the right to manufacture, and offered them, if my memory serves me right, at $21 per gross, allowing me commission of 2½ per cent. on the same. I was afterwards told that these were Daniels' Bitters. He told me, if my memory is correct, that he was selling these bitters in small lots to his customers.

20. Did Mr. Doolittle inform you how many of said Daniels' Bitters they had sold, any further than you have stated?

Ans. He did not.

21. Did you see the bottle and label of said Daniels' Bitters?
(Objected to.)
Ans. I saw a sample bottle of the bitters.
22. Was the sample bottle you saw like the bottle and label now shown you?
371 (Objected to, and to exhibit.)
Ans. It appears to be the same.
(Plaintiff puts the bottle and label in evidence, and the same is marked "Plaintiffs' Ex. I, April 12, 1876.")

CHAS. E. FRENCH.

Deposition of Moses F. Atwood.

MOSES F. ATWOOD, being produced and sworn and examined on the part of the defendant, deposed as follows, to wit:

1. Give your name, age, residence, and occupation.
Ans. M. F. Atwood; my age is thirty-seven; occupation, a farmer; my residence is Union, Hardin County, Iowa.
2. State whether you have ever been concerned in the preparation or sale of Atwood's Physical Vegetable Jaundice Bitters; if you have, where and when, and state in what bottles and with what labels the same were put up.
Ans. I worked, in putting up the bitters, for my father, Moses Atwood, until I was twenty-one years old. I then went to work for L. H. Bateman; while in his employ I manufactured and put up the bitters for him, by a receipt furnished me by Bateman. We used a fluted bottle with the name of the medicine, and, to the best of my belief, the bottle had Moses Atwood, Georgetown, blown in it. The label used was the same that was used by Carter & Dodge, except a private mark, and I do not now know what that was.
3. State with whom you have been so employed.
Ans. With my father until I was of age, and after, L. H. Bateman.
372 4. If you say you have been thus employed with L. H. Bateman, give the date of that and describe the bottle and label he used.
Ans. I went to work for Bateman in the year A. D. 1860. We used a fluted bottle with the name of the medicine, and I believe, Moses Atwood, Georgetown, blown into it. The label was the same as used by my father and Carter & Dodge, with only a private mark difference which I don't now remember.
5. State whether you became acquainted with the manner of preparing and compounding said article, and from whom did you so become acquainted?
Ans. I did become acquainted with the medicine when I worked for L. H. Bateman, and the manner of preparing and compounding it. I became so acquainted with said article and the manner of manufacturing and compounding from L. H. Bateman.
6. State whether you ever at any time put up and prepared said Atwood's Bitters on your own account.
Ans. I never did.
7. If you ever sold to any one the receipt to compound and put up said bitters, state who it was, when it was, and what your age was at the time of such sale, and whether you sold to Nathan Wood.
Ans. I did sell a receipt to Nathan Wood in the year A. D. 1861. I

was then twenty-two years of age, and conveyed to him the right to manufacture said bitters in the State of Maine.

8. Have you put up any of said bitters on your own account since said sale?

Ans. I have not.

9. Where does your father, Moses Atwood, now live; how long has he lived there?

Ans. He lives at New Sharon, Mahaska County, Iowa. He has lived there about fifteen years.

373 10. Did you or not go with him out West; if so, when; and was he or not aware of your sale to Wood?

Ans. I did, about the year A. D. 1855; he was not aware of my sale to Wood.

11. Whether or not you have ever contracted with any one not to compound any more of said bitters; if so, with whom, and when?

Ans. I have not.

12. Whether at the time you were at work with said L. H. Bateman in preparing said bitters, there was any competition between him and other manufacturers; if so, with whom, and where?

Ans. There was competition at that time between L. H. Bateman, Carter & Son, and B. F. Dodge, of Georgetown, Massachusetts, and H. H. Hayes, of Portland, Maine.

13. Was there any difference in the styles of putting up said bitters made by said competing parties; if so, what was such difference?

Ans. There was. The Georgetown parties had one letter in the label misplaced; in every other particular they were alike. Hayes put his up in a round bottle, with a white label.

14. Do you know L. F. Atwood; what relationship is he to you; whether your father ever conveyed to him any right to compound and put up said bitters?

Ans. I do; he is my uncle. I have heard my father say that he gave him the right to compound the bitters..

Cross-interrogatories:

1. If in answer to the third and fourth direct questions, you shall say that you were employed in putting up said bitters, state whether you were so employed by said Bateman on wages, and what wages you were paid.

374 Ans. I was employed by Bateman on wages at one and $\frac{50}{100}$ dollars per day (one dollar and fifty cents.)

2. If in answer to the sixth direct question you shall say that you ever did put up and prepare said bitters on your own account, state when and where you so put up and sold said bitters on your own account.

Ans. I never put up and sold said bitters on my own account.

3. If you made any sale to Wood, as interrogated in the seventh direct question, state whether the sale was in writing; that is, was there any writing between you and Wood, or from you to Wood, in respect to such sale. And if you should say there was any such writing, state where it is.

Ans. There was a writing from me to Wood. I don't where it is. The [writing] was in duplicate, that is, each had a copy. I lost mine, and don't know where his is.

4. Did you ever sell or attempt to sell to Wood anything more than the receipt for making the bitters; what did Wood pay you?

Ans. I did, in the writing to Wood, sell him the right to manufacture said bitters, and sell in the State of Maine and elsewhere. He

paid me money for the right I conveyed to him to manufacture and sell said bitters.

5. If, in answer to the eleventh direct question, you should say that [you] have ever contracted not to compound any more of said bitters, state whether you so contracted in writing.

Ans. I never contracted not to compound said bitters, in writing or otherwise.

6. If, in answer to the fourteenth question, you shall say that your father did convey L. F. Atwood any right to compound and put up said bitters, state what knowledge you have of any such conveyance, from whom you derived such knowledge, and when and where and how you derived such knowledge, and whether such conveyance,
375 if any, from your father to L. F. Atwood, was in writing. Is L. F. Atwood alive; and, if yea, where does he live?

Ans. All I know about the sale of the right to L. F. Atwood is, that I heard my father say that he had given him the right. I don't know whether it was in writing, or not. L. F. Atwood was alive the last I knew of him, and he lived in Nashua, New Hampshire. I heard from him some time during the summer of 1876.

MOSES F. ATWOOD.

Deposition of Solomon Carter.

Direct examination by WILLIAM H. CLIFFORD, Esq:

Solomon Carter; residence, Boston; business, druggist; have been in the business about forty years; have dealt in Atwood's Bitters about thirty years; my impression is that I first bought of old man Moses Carter, of Georgetown, Mass.; I cannot recollect whether those I first bought were put up in a smooth or a fluted bottle; afterward, I bought of the son or sons of Moses Carter; I also bought of Bateman; I probably bought of other parties, but I cannot remember distinctly; my recollection is that there were words blown in the bottles bought of Moses Carter. I don't remember that it was always so, and I don't remember that it was not; I have sold him fluted bottles without the bitters; I don't know what use he made of them; they were of the same size as his bitter bottles; I don't know that I have bought of Moses Carter bitters where his name, or "Carter's are the only genuine" did not appear; but I have bought them without those words
376 from the young man Carter At this time I don't know whether the old gentleman was out of business, or not. I have also bought of the young man Carter bitters where the words "Carter & Sons" and "Carter's are the only genuine" appeared on the label. I will not swear positively that the labels which read Moses Carter & Sons also contained the words "Carter's are the only genuine."

1. When, if at all, did you buy any bitters of Carter & Sons, the labels of which did not have their names?

Ans. 'Long about 1870.

2. Did, or not, these labels have the words "Atwood's Vegetable Physical Jaundice Bitters"; also, "manufactured by Moses Atwood, Georgetown, Mass.;" also "Georgetown, Mass.," blown in the glass of the bottle?

Ans. I can't answer that question direct; I can't say certain; I can say it had the words "Atwood's Jaundice Bitters," but can't swear positively that the label had on it the words "Vegetable Physical." I can't swear that the label had the words "manufactured by Moses Atwood, Georgetown, Mass.," on it; I can swear it had the words "Moses At-

wood" on it. I know that some of the bottles had the words "Georgetown, Mass.," blown in the glass; I can't swear that all of them did.

3. Were, or not, the bottles fluted bottles; were, or not, the labels yellow labels?

Ans. My impression is that they were fluted bottles and yellow labels.

4. At the time that you purchased these, were there not in the market Atwood's Bitters, having the same kind of bottle and label, with Carter & Sons' names on the label?

Ans. They were.

5. At what price were these Carter & Sons' Bitters selling per gross at this time?

Ans. I should say from twenty-four to twenty-seven dollars per gross.

6. At what price were the others sold?

377 Ans. Twenty to twenty-one dollars per gross; I mean what both were sold to me for.

7. To whom were the cheap bitters sent by Carter?

Ans. They were shipped (bill of lading) to Carter & Wiley.

Ans. Were they known in the market as the manufacture of Carter & Sons?

Ans. I could not say.

9. Can you state whether Carter & Sons desired it to be kept secret that they were made by them?

Ans. I can't say for certainty as to that; I suppose so. I can't say that Mr. Carter expressed any desire. I wish to say that most of the cheap bitters were consigned to me, were not bought by me.

10. Who disposed of those which were consigned to you?

Ans. Most of them were sold by a broker.

11. Was there any difference between the way in which the bitters, the labels of which contained Carter's name were billed, and the cheaper ones, which did not?

Ans. I could not say whether the bills read any different. Part were bought by us, and part were consigned.

12. For how long did Carter & Sons continue to sell the two kinds of bitters with the two kinds of labels?

Ans. Two or three years.

13. Did you ever hear Carter, or Carter & Sons, or any of them, intimate a wish or a preference that their manufacture of these bitters should not be known?

Ans. I don't recollect any intimation to me.

14. Do you remember if there was any difference in the color or appearance of the article in the bottles?

Ans. I don't remember.

15. Do you remember whether, at this time, L. H. Bateman was manufacturing and selling the Atwood Bitters at a less price than those which had the Carter name upon the label?

378 Ans. He did.

16. Can you state approximately when the labels with the Carter & Sons name on them first appeared?

Ans. I could not say.

17. During the two or three years you mention, state if you dealt in the Bateman Bitters, and the price of the same, near as you can.

Ans. I dealt to some extent in them; the price, as near as I can remember, was from $21 to $24.

18. Whether or not the Bateman, and the bitters of both kinds made by Carter & Sons were competing in the market and before.

Ans. They were, to my best remembrance.

Cross-examination by Mr. CHASE, counsel for plaintiffs:

1. Did you always understand the persons of whom you bought the bitters named by you were the persons who had the proprietary right to the trade-marks of the article in question?

Ans. I did.

2. Was it so generally understood by the trade?

Ans. So far as I know, it was.

3. Were those trade-mark rights respected by you, and by the trade, so far as you know?

Ans. They were, so far as I know.

4. Of whom, as a manufacturer, is the article now purchased by you and by the trade, so far as you know?

Ans. I purchase of the Manhattan Medicine Company, or of John F. Henry, Curran & Co., general agents. I know there is another article of Atwood's Bitters in the market. This article is marked L. F. Atwood, put up in smooth round bottle. My impression is this. I don't know whether it is the bottle marked H. H. Hay, Portland,
379 Maine. I don't know what the label on it is; I have not dealt in the article.

Redirect by Mr. CLIFFORD:

1. State, as far as you know (how) the label and trade-mark rights, as they were called in the question, were respected by the trade. Did you ever hear of the assertion of the claim of an exclusive right in any one person to the fluted bottle, the label, the words, &c., such as usually accompany this medicine, until the right was claimed by the complainants?

Ans. I don't recollect that I have.

Cross resumed by Mr. CHASE:

1. Why did you not make and put up the article in question, and use the style of bottle and label such as were used with the article, instead of buying the article of the Georgetown parties, as you have stated?

Ans. In the first place, I don't know as I ever had the disposition to put it up, if I had the right. I did not suppose that I had the right to put it up. I supposed there were parties who had the right to put it up.

SOLOMON CARTER.

Deposition of Andrew G. Weeks.

My name is Andrew G. Weeks; I reside in the city of Boston; my occupation is wholesale druggist. I am a member of the firm of Weeks & Potter, wholesale druggists, 360 Washington street, Boston.
380 The firm of Weeks & Potter has been in existence twenty-six years. I am acquainted with Nathan Wood & Son, defendants in this suit. I have been acquainted with the defendants a number of years.

1. Has your firm of Weeks & Potter had dealings with the defendants in an article of bitters called Atwood's Vegetable Physical Jaundice Bitters, within the last two years?

(Objected to as incompetent and irrelevant.)

Ans. We have.

2. Has or not the firm of Weeks & Potter received of the defendants for sale an article called Atwood's Vegetable Physical Jaundice Bitters, bottled and labeled like the sample now shown you and marked Plaintiffs' Exhibit A, May 2d, 1877?

(Objected to, same as above.)

Ans. They have.

3. What quantity of this article, so bottled and labeled, have Weeks & Potter so received from the defendants?

(Objected to, same as above.)

Ans. 118 gross, 2½ dozens.

4. When did your firm so receive it?

(Objected to, same as above.)

Ans. Within the years 1875 and 1876, and all prior to the 1st of May, 1876. We received it at different times in different lots, as they put it up and chose to send it.

5. At what prices did the defendants sell this article, Exhibit A, to your firm?

(Objected to, same as above.)

Ans. These bitters were consigned to us as general agents of the defendants, not sold to us. I mean we were general agents of the defendants only for this particular article, and our name as general agents were stamped on the labels same as on Exhibit A above. We sold of the article in this form, 73 gross, 8¾ dozens.

381 (Objected to, same as above.)

6. At what prices did Weeks & Potter sell this article, Exhibit A, so received from the defendants?

(Objected to as above.)

Ans. We received about twenty-four dollars per gross.

7. Where did you sell it?

(Objected to, same as above.)

Ans. We sold it all over the country, to our customers generally.

Cross-examination by Mr. CLIFFORD:

1. Have there not been for years previous to 1872 or 1873, a variety of bitters called Atwood's Bitters, put up by different persons under their own names?

Ans. There has.

2. Has there ever been any put up in the form of Exhibit A previous to this one?

Ans. Yes, sir.

3. By whom?

Ans. By M. Carter & Sons, I think, many years ago. That was before the fluted bottle was in existence. It was not quite as large round, and it may have been a little longer. It might not have been M. Carter & Son; it might have been M. Carter.

4. How many different varieties of labels and other marks can you enumerate under which this article has been bought and sold?

Ans. All of them have a similarity. There were three different kinds, and all came from Georgetown, Mass.

5. How many years have you bought and sold this article?

Ans. It has been sold by Weeks & Potter ever since they have been in existence, and I remember to have sold five years before that. I used to sell them (the manufacturers of the bitters) the round

382 bottles; then when the fluted bottle came into existence, I sold them the fluted bottles. No letters on the fluted when we first

sold them; they were common eight-ounce, long-fluted bottle', and the plain bottle was called the "common prescription." Those were the trade name' of the bottle. These were bottles not made for any special purpose, but were for common use in the drug store. I never heard any person make any exclusive claim to the use of the fluted bottle, and the yellow label with the words Atwood's Bitters on it, until the claim was made by the Manhattan Medicine Company. I never heard any one make any claim to the yellow label with the words "Atwood's Vegetable Physical Jaundice Bitters" on it until it was made by the Manhattan Medicine Company. There are now two or three different forms of bottles in which the medicine is put up and sold and kept in stock, and has been for several years. The Exhibit A, May 2d, 1877, is different in form and proportions from any Atwood Bitter bottle now in the market, or has been for several years—enough to distinguish it from them. I, as dealer, would readily remark the difference when I saw it.

Redirect by Mr. CHASE:

We have bought direct of M. Carter & Son, and also direct of L. H. Bateman, and also bought some which purported to come from Georgetown from Charles E. French, broker; don't know who made those. By the three different kinds of Atwood's Bitters mentioned by me as being now in the market, I mean those put up and sold by the Manhattan Medicine Company, and those put up by H. H. Hay, of Portland, as L. F. Atwood's, and those by the defendants in the long round bottle. Never heard any discussion of trade-marks on this medicine until it was brought up by the Manhattan Medicine Company—dis-
383 cussion one way or the other. We bought the article of the parties whom we supposed had a right to sell it.

Cross-examination resumed:

Previous to the claim by the Manhattan Medicine Company, we should not have hesitated to have bought the article of any one, so far as the right to sell it was concerned, for the reason that I had spoken to Mr. Carter about the bitters which came from Mr. French, and he made no objection; and from further talk with him, I came to the conclusion that he, Carter, put them up himself, although he did not acknowledge that he did.

ANDREW G. WEEKS.

Deposition of William R. Cady.

My name is William R. Cady; residence, Lowell, Mass.; occupation, agent for J. W. Tufts' soda apparatus, 33 Bowker street, Boston.

I was employed or dealt in and sold Atwood's Jaundice Bitters. I bought and sold them on my own account. I began quite a number of years before the war. About 1868 or '69 I left the business. When I first began, I bought of Moses Atwood—the old gentleman. They were not much sold at that time. I only bought a few to fill orders. He put them up in Georgetown, Mass. He used, for the first I bought of him, plain, round bottle; not positive, but that is my impression. I did not buy of Moses Atwood long, and only in small quantities. There was a label on the bottle when I first began—a yellow label;
384 pretty confident of that. There were on the label the words "Atwood's Jaundice Bitters." There were directions on the label for taking and using the medicine. It also contained the words

"Manufactured by Moses Atwood, Georgetown, Mass." There was his private mark on the label in the word "the," the letter "e" being left out. This word "the" was near the bottom of the label, and was always there in the same place. This letter "e" was left out also on the plates from which the label was printed. That was the mark by which we knew the Moses Atwood Bitters. The Levi Atwood Bitters did not have the "e" left out of the "the."

When I bought of Moses Atwood, the old man, I knew that Levi and his brother manufactured and sold the bitters. They used a white label. The man in Maine, I think his name was Levi, but I am not certain as to his name. I think I next bought of Carter, of Georgetown, a young man who used to travel on the road. Those bitters were put up in a six or eight sided bottle, without any name blown in the glass. The color of the label was yellow, and the letter "e" was omitted from the "the." I bought of him only a short time. When I first bought of him, Carter or Carter & Sons' names were not on the label, or were they ever when I bought of Carter. Some two, three, four or five years afterward, I first saw the bitters with words "Carter & Sons," or "Carter's the only genuine," on the label. On the labels containing the words "Carter & Sons" and "Carter's the only genuine," the "e" in the "the," I think, was still left out. I next bought of L. H. Bateman, Georgetown, Mass. I think it was all of ten years; it might have been more. He used a hexagon or an octagon bottle, with no letters blown on it. I don't think I ever bought any of Carter with the letters blown in the bottle. Very soon after I began to buy of Bateman, he began to use the bottle with the letters blown in the
385 glass. So did Carter. The words were "Atwood's Jaundice Bitters, made by Moses Atwood, Georgetown, Mass.," or words something like it. I don't recollect the exact words; it has been eight or ten years since I handled any of them. I know the words "Moses Atwood, Georgetown," were blown in the glass. The only difference between the Carter and Bateman bottle was, that one had letters larger than the other. The Bateman label said "Manufactured by Moses Atwood, Georgetown, Mass." Bateman put his name across the label—L. H. Bateman—in red ink, some time after the war commenced; I can't tell when. I think that L. H. Bateman had in his possession some of the original Moses Atwood labels when the old man went away.

Int. From whom, if any one, did you learn that he had such labels in his possession?

Ans. From L. H. Bateman.

After L. H. Bateman and Carter put their names on the bottles, they were distinguished by the size of the letters on the bottles and by the color of the bitters; one was lighter than the other. At the time Bateman and Carter were putting up *in* their bitters, there was a man by the name of Dodge, at Rowley, Mass., putting them (the bitters) up. There was a man in Lowell putting them up; his name I do not know. There was the old man Levi, in Nashua, N. H., and his (Moses') brother in Maine. I don't recollect anybody else. The man in Lowell used a smooth bottle, and I think he did not have the yellow label. I know he did not use Moses Atwood's label. He had the words "Atwood's Jaundice Bitters" at the top of the label. He did not have Moses Atwood's name at the bottom of the label. The price of the bitters during the war was twenty-seven dollars ($27) a gross, I think. There was some in the market that sold for less. I can't say who put up those which sold for less. They had the same bottle, letters

386 in the bottle, and the same label, except the letters in the bottle were of different size.

Cross-examination by Mr. CHASE, plaintiffs' counsel:

I can't tell the year I began to sell Atwood's Bitters. It was some years before the war; have no means of telling the exact year. I can tell within five years; 1855 would be within five years. It was within five years of 1855. I think it was within three years of 1855. I think it was before 1855. I don't mean to swear positively that it was before 1855; if I was going to guess, I would say 1853. I think (it was) 1868 when I left off selling. I am not sure of it, but I think it was. I know it was within two or three years of 1868. I am positive that it was in 1868. I am not certain that it was in 1868. I commenced to commission the Mexican Mustang Linimentin 1853 throughout the New England States, and visited 500 or more drug stores, and also took orders for other patent medicines, and at that time had very little call for Atwood's Bitters. I continued to buy of Moses Atwood but a short time. The words on the label, when I bought of Moses Atwood, were "Atwood's Jaundice Bitters," Moses Atwood, Georgetown, Mass., and the general directions were also on the label. In the word "the" on the label, the letter "e" was left out. The directions to be used for jaundice and other diseases were on the label. I cannot specify any other words on the label. The words "Vegetable Physical," in connection with the words Jaundice Bitters, might or might not have been used on the label. I can't swear; I have not read one of them for a number of years. I can say whether the words "Vegetable Physical" were used on the label at all. I have reference to all the labels up to the time I ceased my acquaintance with the article. It is my impression that these words were on. The word "the," from which the "e"

387 was omitted, was at the bottom of the label. It was between 1855 and '60 that I noticed the omission of the letter "e" from the word "the." I never saw the letter "e" in the word "the." I knew that the omission of the letter "e" from the word "the" was Moses Atwood's private mark by his telling me so. Moses Atwood told me so when he was in the business before he went away, at Georgetown, Mass., I think. I cannot tell the year. I think the bitters sold by Levi Atwood had Levi Atwood's name on the label; no name on the bottle; round, smooth bottle; white label. I think Levi Atwood's place (Nashua N. H.), was also on the label. It must be within twelve years that I have seen one of Levi Atwood's label'. I cannot remember now what was on the Levi Atwood label. I think the Atwood who sold in Maine was named Levi, jr. I don't remember what was on his label. "Atwood's Jaundice Bitters" were at the top of the label, but what other words I cannot say. The words on the Carter label were the same as on the Moses Atwood and the Bateman label. The Maine man used a smooth, round bottle.

WM. R. CADY.

Deposition of A. C. Titcomb.

U. S. circuit court, district of Maine. In equity.

MANHATTAN MEDICINE COMPANY }
vs.
NATHAN WOOD ET AL. }

Interrogatories propounded to A. C. TITCOMB, witness of respondents, by WILLIAM HENRY CLIFFORD, Esq.:

1. Give your name, age, and business.

2. Were you ever employed by M. Carter & Son, of Georgetown Mass.; and, if so, what were your duties?

388 3. Did you ever travel for them selling Atwood's Vegetable Physical Jaundice Bitters?

4. How many kinds of labels were used on the bottles containing the bitters put up by M. Carter & Sons, or Carter's Sons?

5. Did or not the Carters have one label which was used exclusively by them; if so, describe it?

6. State what you know, if anything, concerning bitters put up at Carter's place under the different kinds of labels, if you state that such different kinds of labels were used.

To the first interrogatory he saith: My name is William A. Titcomb, I am twenty-two years of age, and am a commercial traveler.

To the second interrogatory he saith: I was employed by them for three years from March 13, 1870, at Georgetown, Mass. My duty at first was that of clerk in their retail department. Afterwards I went into their laboratory and worked at bottling their goods generally. After that I had a wagon and traveled on the road selling their goods.

To the third interrogatory he saith: I did.

To the fourth interrogatory he saith: There were two kinds of labels used on the bottles containing the bitters put up by M. Carter & Son.

To the fifth interrogatory he saith: They did have one label which was used exclusively by them. It was a yellow paper label printed with black ink. On the top of the label were printed the words "Carter's are the only genuine," and below the directions were printed the words "Manufactured by M. Carter & Son (successors to Moses Atwood), Georgetown, Mass." At the bottom of the label were

389 printed the words "Caution: Observe that our name is blown in the bottle, and also on the revenue stamp over the cork. None others are genuine." The label also bore the words "Atwood's Vegetable Jaundice Bitters."

To the sixth interrogatory he saith: There were two kinds of bitters put up at Carter's place under the two kinds of labels which I have stated that they used. One kind, under the label described in my last answer, was the Genuine Atwood's Vegetable Physical Jaundice Bitters, and was sold in the market at wholesale at twenty-seven dollars per gross. The other kind was an inferior article, an imitation of the genuine, and was sold in the market at wholesale at about fifteen dollars per gross. This latter kind bore the old-fashioned original label of Atwood's Bitters, with the "e" left out in the word "the" preceding the words "United States." I never sold any but the first kind, and always denounced as imitations all others wherever I found them. Such were my instructions. Carter's traveling agents never sold any but the genuine. The imitation was disposed of by Carter alone. The imitation article would not keep, but turned sour, and was sometimes returned. In most instances the two kinds were retailed at the same price; but where both kinds were known the genuine brought a higher price.

WILLIAM C. TITCOMB.

390 AFFIDAVITS INTRODUCED BY RESPONDENTS AS PER STIPULATION.

Affidavit of Solomon Carter.

I, SOLOMON CARTER, of Boston, in the State of Massachusetts, being duly sworn, on oath depose and say as follows:

Am 57 years of age; occupation, a druggist; been in the business

forty years. Am acquainted with Atwood's Bitters; have bought and sold them. They are known by different label names, such as Bateman's, Carter's, &c. All have the yellow label. H. H. Hay sells these bitters, and they are distinguished by his mark, so with Wood, Carter, Bateman, and others.

Some years ago these bitters were on sale under the names of Bateman and Carter. This was the word that distinguished the kind of bitters.

I am not aware that the yellow label or the name Atwood distinguishes the bitters, but they are bought by the name of the manufacturers.

The color of the label and the shape of the bottle are used in putting up various medicines.

SOLOMON CARTER.

Affidavit of Samuel Rolfe.

Circuit court U. S., district of Maine.

MANHATTAN MEDICINE COMPANY
v.
NATHAN WOOD.

I, SAMUEL ROLFE, of Portland, in the district of Maine, being duly sworn, on oath depose and say as follows:

391 I am a resident of Portland; am 61 years of age. My business is that of a druggist, and have been in the business forty-five years. I have known the bitters put up by Nathan Wood and H. H. Hay, of Portland. They have used a yellow label and a sided bottle, that is, one having panels or flat sides. The same bitters, or a bitter that is substantially the same, is put up by other makers, but I believe I have not sold them. The bitters are known and distinguished in the market and in the trade by the manufacturer's name. For instance, a person wishing to buy Wood's Bitters will not take H. H. Hay's; and so if one wishes H. H. Hay's he will not take Wood's. The mark by which they pass, and are bought and sold in the market, is the name of the maker. The use of the yellow label, the name of Atwood, or the bottle, by any one, would not interfere with the sale of any of these manufacturers' bitters because those things are not the mark by which they are known in the market. I have never been able, in my dealings in these bitters, to sell them except as above described.

I have been acquainted with these bitters ever since they were started, and do not think that many of the Bateman, Carter, or Mystic Bitters have been sold in Maine with me, at least not until a recent period. Hay's and Wood's have been the bitters called for in Maine with me. My opinion is, that the trade in these bitters has now become so well established under the several names of the manufacturers, that the use of anything but their names would not interfere with the business of any maker. No exclusive claim to the word Atwood, the color of the label or the shape of the bottle was ever made known to me. The yellow label and the shape of the bottle are in use with other medicines, and have been for a long time. If one were not acquainted with the manufacturer's name, I should sell him either I happened to have. Have formerly kept both.

SAMUEL ROLFE.

392 *Affidavit of John W. Perkins.*

U. S. circuit court, Maine district.

MANHATTAN MEDICINE COMPANY
vs.
NATHAN WOOD.

I, John W. Perkins, of Portland, in the county of Cumberland and State of Maine, being duly sworn, on oath depose and say as follows:

Am a wholesale druggist; have been in the business thirty years. I have bought and sold Atwood's Bitters for fifteen years under the names of Nathan Wood or H. H. Hay. These bitters are known in the market by different names. These are Bateman's, Carter's, and others. They have been so distinguished for many years. All have the yellow label and bear the name of Atwood. These were put up, I believe, first in Georgetown, Mass. M. Carter & Son and Bateman put up these bitters at the same time in Georgetown, Mass., using the same label. The only difference between their labels is that one has the name of Bateman and the other Carter. Others have put up these bitters, and they have been and are known by their names. H. H. Hay of Portland, puts up and sells L. F. Atwood's Bitters. Nathan Wood puts up his bitters, and the label has his name.

As early as 1851 these bitters were put up by Bateman and Carter, and the business was continued for several years. No claim of any exclusive right to the label was ever made known to us until it was recently bought by the Manhattan Medicine Company.

While Carter and Bateman were making these bitters, certain bitters were put up by Carter of an inferior quality and sold under the same label. These were not the Atwood's Bitters, although they pur-
393 ported to be such. The usual price was $27.00 per gross; these were sold for less than $20.00.

A yellow label and a bottle formed with twelve panels or sides are both common, and are used with various medicines.

The distinguishing mark upon the Atwood Bitters is the name of the person by whom they are put up. They are so bought and sold.

The use of the label, the name of Atwood, by any one, would not interfere with the business of any of these manufacturers, because the bitters are called for by the name of the manufacturer. In my dealings, I only sell them in that way. The business has become well established, and the sales are made as above described. Mr. Wood uses on his bottles the words "Moses F. Atwood," or "M. F. Atwood."

The published prices current of John F. Henry, Curran & Co., exclusive agents for the Manhattan Medicine Co., show the prices of the different kinds of bitters, which are known by the names of the different manufacturers. I annex herto one of these, and mark it "A."

JOHN W. PERKINS.

Exhibit A.—E. M. R., Comm'r.

JOHN F. HENRY. THEODORE CURRAN. HENRY E. BOWEN.

[United States Medicine Warehouse, Nos. 8 & 9 College Place, N. Y. John F. Henry, Curran & Co.'s special net cash price list, April 15, 1875. For the wholesale trade only. Proprietary articles of our own manufacture.]

Baker's Pain Panacea, small	1 gro.	21 00	5 gro.	20 00
" " medium	1 doz.	3 50	1 "	40 00

	" " " large	1	"	7	00	1	"	80	00
	Bennett's Cough Tablets	1	"	1	75	1	"	18	00
	" Worm Lozenges	1	"	1	50	1	"	15	00
	" Golden Liniment	1	"	1	50	1	"	16	50
394	Bennett's Quick Cure	1	"	3	25	1	"	36	00
	" Fever and Ague Pills	1	"	3	25	1	"	36	00
	Bennett's Sure Death to Rats	1	"	1	50	1	"	16	50
	Barrett's Mucilage	1	"	1	25	1	"	12	00
	Barber's Red Horse Powders, small	1	gro.	16	50	5	"	15	00
	" " " " large	1	"	33	00	5	"	30	00
	Boardman's Cod Liver Oil	1	doz.	6	00	1	"	69	00
	" French Worm Confections	1	"	1	25	1	"	12	00
	Circassian Hair Oil	1	"	2	75	1	gro.	30	00
	" Restorative	1	"	6	50	1	"	72	00
	Dale's Persian Horse and Cattle Pow., sm'l	1	gro.	15	00	5	"	14	00
	" " " " " l'ge	1	"	30	00	5	"	28	00
	Denton's Balsam	1	"	21	00	5	"	20	00
	Edey's Carbolic Troches	1	"	20	00	5	"	19	00
	" " " in glass	1	doz.	3	75	1	"	42	00
	Francis' Dentifrice	1	gro.	18	00	5	"	16	50
	" T. A. Drops ("Water of Happiness")	1	"	16	50	5	"	15	00
	Foord's Pectoral Syrup	1	doz.	5	50	1	"	57	00
	" " " large	1	"	11	00	1	"	114	00
	" Tonic Cordial	1	"	2	50	1	"	28	00
	Green's Oxygenated Bitters	1	doz.	7	75	1	"	87	00
	Hall's (Dr. Wm.) Balsam for the Lungs	1	gro.	87	00	5	gro.	84	00
	Henry's Carbolic Salve	1	"	20	00	5	"	18	50
	" Camphor Ice	1	"	16	50	5	"	15	00
	" Chlo. Pot. Lozenges	1	"	16	00	5	"	15	00
	" Mucilage	1	doz.	1	50	1	"	15	00
	" Insect Powder	1	gro.	18	00	5	"	15	00
	" Sewing Machine Oil	1	doz.	1	50	1	"	16	50
	" Salts of Lemon	1	"	1	00	1	"	7	50
	" Fluid Extracts and Elixirs, 40 per cent. off list.								
	Hutching's Bitters	1	doz.	8	00	1	"	84	00
	Kellogg's Worm Tea	1	gro.	20	00	5	"	18	50
	Kellinger's Infallible Liniment [gen.]	1	"	21	00	5	"	20	00
	" Larger sizes in proportion—3 sizes, 25c., 50c., and $1.00.								
	Louden's Indian Expectorant	1	doz.	7	50	1	gro.	84	00
	" Oriental Hair Tonic	1	"	7	50	1	"	84	00
	" Alterative	1	"	7	50	1	"	84	00
	" Fever and Ague Pills	1	"	7	50	1	gro.	84	00
	" Pile Remedy	1	"	7	50	1	"	84	00
	" Carminative Balsam	1	gro.	33	00	5	"	30	00
	" Tonic Vermifuge	1	"	33	00	5	"	30	00
	" Sanative Pills	1	"	20	00	5	"	18	00
	" Cherokee Liniment	1	"	45	00	5	"	42	00
395	Lockwood's Catarrh Cure	1	doz.	3	25	1	gro.	36	00
	" Nasal Douche	1	"	3	50	1	"	40	00
	" Liver and Stomach Pills	1	"	3	25	1	"	36	00
	Morse's Invigorating Cordial	1	doz.	18	00	1	"	194	40
	Mott's Veg. Liver Pills	1	gro.	17	00	5	"	16	00
	" " " " Sugar Coated	1	"	18	00	5	"	17	00
	Osborn's Nerve and Bone Liniment	1	"	15	00	5	"	13	50

Ink Saucers, English (late Morgan's)	1	"	7 00	10	"	5 50
Plasters, Poor Man's, paper	1	"	9 00	5	"	7 00
" " " kid	1	"	16 00	5	"	14 00
" " " cloth	1	"	13 50	5	"	12 00
" Belladonna, kid	1	"	30 00	5	"	24 00
" Arnica, kid	1	"	16 50	5	"	15 00
" " cloth	1	"	14 00	5	"	13 00
" " paper	1	"	10 00	5	"	8 00
Rogers' Veg. Worm Syrup	1	"	21 00	5	"	20 00
" Indian Fever Cure	1	doz.	7 25	1	"	84 00
Reynold's (Dr.) Eye Water	1	"	1 50	1	"	15 00
Russian Hair Dye	1	"	3 75	1	"	40 00
Rosadalis	1	gro.	120 00	5	"	114 00
Scovill's Sarsaparilla and Stillingia, or Blood and Liver Syrup.	1	"	90 00	5	"	87 00
Sylvester's Benzine	1	"	11 00	5	"	9 00
" Bay Rum	1	doz.	9 00	1	"	96 00
" " " small	1	"	5 50	1	"	60 00
" Seidlitz Powders	1	gro.	39 00	5	"	36 00
" " " full weight	1	"	48 00	5	"	45 00
" Soda "	1	"	21 00	5	"	18 00
Stop it, for Tooth-Ache	1	doz.	1 75	1	"	17 00
Townsley's Indian Tooth-Ache Anodyne	1	"	1 75	1	"	17 50
Upham's Hair Gloss	1	"	3 50	1	"	40 00
" Pimple Banisher	1	"	3 50	1	"	40 00
" Tetter Ointment	1	"	3 50	1	"	40 00
" Magnetic Oil, small	1	"	3 50	1	"	40 00
" " " large	1	"	7 00	1	"	80 00
Warren's Tonic Cordial	1	"	8 00	1	"	90 00
" Pile Remedy	1	"	7 25	1	"	84 00

Net cash price list of articles for which we have sole, special, or general agency for the wholesale trade only.

Atwood's Bitters, (Bateman's)	1	gro.	30 00	10	gro.	27 00
" " (Carter's)	1	"	30 00	10	"	27 00
" " (Mystic's)	1	"	30 00	10	"	27 00
396 Alexandra Perfumers	1	gro.	11 00	1	gro.	126 00
Anderson's Dermador, small	1	"	1 90	1	"	21 00
" " large	1	"	3 80	1	"	42 00
Bishop Soule's Liniment	1	"	12 00	1	"	126 00
" " " small	1	"	6 00	1	"	63 00
Briggs' Ind. Ink and Glass Pens	1	"	2 00	3	"	21 60
Brown's Jamaica Ginger	1	gro.	43 50	5	"	42 00
Brant's Indian Pul. Bals	1	doz.	7 50	1	"	84 00
" " Purifying Extract	1	"	8 50	1	"	96 00
Burbank's Ext. Opium	1	"	3 00	1	"	30 00
" Seltzer Aperient	1	"	7 00	1	"	80 00
Burr's Nursing Bottles, green glass	1	"	2 75	1	"	31 35
" " " flint "	1	"	3 00	1	"	34 20
" " " " in boxes	1	"	4 00	1	"	45 60
" Fittings Complete	1	"	2 25	1	"	24 70
" Medallion Nursing Bottles	1	"	1 50	1	"	16 50
" "Eagle" " "	1	"	3 50	1	"	38 00
Borden's Ext. Beef, sm'l	1	"	3 00	1	"	32 00

" " " l'ge	1	"	5	75		1	"		63	00
Bailey's Saline Aperient	1	gro.	44	00		3	"		42	00
Biokrene	1	doz.	8	00		1	"		84	00
Cathery's Eng. Dog Soap	1	"	1	75		1	"		18	00
" " Plate Powder	1	"	1	50		1	"		15	00
Chesebrough's Vaseline, 2 oz. bottles	1	"	2	00	Less 15 per cent.	1	"	Less 20 per cent.		
" " 4 oz. "	1	"	3	75		1	"			
" " 1 lb. "	1	"	7	50		1	"			
" " 5 lb. cans, each	2	50				1	doz.			
" " 10 lb. " "	5	00				1	"			
Coe's Dyspepsia Cure	1	gro.	87	00		5	gro.		84	00
" Cough Balsam, small	1	"	33	00		5	"		30	78
" " " large	1	doz.	7	50		1	"		84	00
Comstock's Rational Food, small	1	"	2	75		1	"	10 p c off.		
" " " large	1	"	5	00		1	"	" " " "		
Costar's Rat Exterminator	1	gro.	17	00		5	"		16	00
" Bedbug "	1	"	17	00		5	"		16	00
" Insect Powder	1	"	17	00		5	"		16	00

397 *Affidavit of Moses F. Atwood.*

EXHIBIT 5.—G. E. B., *sp. ex'r.*

STATE OF IOWA, *Hardin County:*

"I," Moses F. Atwood, being duly sworn, upon his oath say: That he is a resident of the town of Union, Hardin County, in the State of Iowa; that I was born in the State of New Hampshire, in the town of Hampstead, on the 28th day of March, A. D. 1839; that I am a son of Moses Atwood, and that my father is sixty-six years old; that I worked for my father, assisting him to put up Atwood's Vegetable Physical Bitters and other work until I was sixteen years old, when my father moved to New Sharon, in the State of Iowa, in the year A. D. 1855, where he now resides, at which place I went with him. About January, A. D. 1860, I moved back to Georgetown, Massachusetts, where I had formerly resided, and commenced work for a person named L. H. Bateman, who was engaged in the manufacture of the aforesaid bitters, and so continued in his employ, assisting him in the manufacture of the aforesaid bitters, until the year A. D. 1861, when I moved back to this State, where I now reside. And that my father used the twelve-square or fluted bottles, said bottles being used by my father in putting up the aforesaid described bitters; also L. H. Bateman, to my personal knowledge, used the aforesaid described bottles in putting up said bitters. In the year A. D. 1861, when I was about twenty-two years of age, and before moving to the State of Iowa, I sold and conveyed unto one Nathan Wood, of Portland, Maine, a right to manufacture and sell in my name Atwood's Physical Jaundice Bitters in the State of Maine and elsewhere, as per receipt dated May, A. D. 1861. And that I learned the art of the manufacture of the aforesaid described bitters by working at the business with my
398 father and L. H. Bateman, the party aforesaid mentioned. All the parties who have manufactured these bitters, to my knowledge, are my father, L. H. Bateman, Carter, Dodge & Co., Levi Atwood, Levi F. Atwood, and H. H. Hay, of Portland, Maine. My father now puts up these bitters and sells on the territory he reserved when he sold out to Carter, Dodge & Co., which was the territory east, north, and south of Illinois and Wisconsin. And further this affiant sayeth not.

MOSES F. ATWOOD.

Affidavit of Joseph R. Scates.

U. S. circuit court, district of Maine.

MANHATTAN MEDICINE COMPANY
vs.
NATHAN WOOD ET AL.

I, Joseph R. Scates, of Gloucester, in the State of Massachusetts, being duly sworn, on oath depose and say as follows:

I am sixty-six years of age; trader; keep a variety store. Somewhere about twenty or twenty-five years ago, and it may be before, I was at work in Georgetown. I was in Georgetown when the first bitters, now called Atwood's, were made. They were made by L. H. Bateman on a receipt furnished by Moses F. Atwood. I know this from the fact that I knew M. F. was the son. A jug full was first made. When first made by Bateman and put on the road, I think he used a yellow label. There was some sort of an arrangement between him and Moses F., but what I do not know. The prescription, as I understand it, was a medicine given to Atwood when he was sick some time, by some
399 doctor, to him or his father. I once saw Moses Atwood at Nashua, some short time afterwards, and he put up the bitters and sold them with a white label. I was on the road for some years, and always knew the old man Atwood's Bitters by the white label. Bateman used the yellow label. Both used the round smooth bottle at first, and the medicine was so sold in the market in those bottles. Then they took the fluted bottle without any letters. My circuit in selling included Nashua. The first bitters put up by Moses Atwood had the white label. Bateman's Bitters were distinguished by the omission of a single letter in one of the words on the label. Later years a number of persons were putting up the bitters, using the yellow label and the fluted bottle. I knew of this going on for several years. Excepting the Bateman and Carter suit, nobody ever claimed any exclusive right in the bottle and label. I think the yellow label was originated by Bateman and Moses F. Atwood when they were together. I worked for L. H. Bateman, off and on, three or four years. I am quite certain that Atwood (M. F.) and Bateman got up the twelve-sided or fluted bottle first.

The origin of the bitters was the prescription given to M. F. Atwood by some doctor, and then he and Bateman began to put them up as I have described. Atwood wanted Bateman to make some and give them away so as to give them a name. I think that Moses did not put up any bitters till after Bateman and M. F. Atwood did.

I annex hereto Ex. A., a bottle also used by Bateman. When I traveled selling the Bateman Bitters, it was always understood I was not to trespass on Portland rights. At this time Bateman used the fluted bottle and the yellow label.

JOS. R. SCATES.

400 *Affidavit of Levi F. Atwood.*

U. S. circuit court, Maine district.

MANHATTAN MEDICINE COMPANY
v.
NATHAN WOOD ET. AL.

I, Levi F. Atwood, of Nashua, in the district of New Hampshire, being duly sworn, on oath depose and say as follows:

I am sixty-six years of age, by occupation a decorator and paper-

hanger; am the brother of Moses Atwood. I worked with him at Georgetown, Mass., in putting up the Atwood's Bitters. I was with him in business one or two years. After we had been together a year or two we separated. He sold his recipe to Carter, Dodge & Company. I do not think it was a sale of anything but the prescription for the bitters and the right of using his name. When my brother sold to Carter, Dodge & Co., the right to Maine and New Hampshire was not included; also certain Western States, the names of which I do not remember. The sale to Carter, Dodge & Co. did not cover Maine and New Hampshire. Moses F. Atwood, the son, was always with his father at Georgetown, and until after he was one and twenty, as I think. These facts I had from Moses Atwood, my brother, and do not know them by any other means. I got a recipe from my brother, and sold to H. H. Hay, Portland, an improved recipe of my own. I made some additions to the recipe, and sold H. H. Hay this recipe of my own.

L. F. ATWOOD.

401 *Stipulation.*

Circuit court U. S., Maine district. In equity.

MANHATTAN MEDICINE COMPANY
v.
NATHAN WOOD ET AL.

Captions, certificates, and jurats to the accompanying depositions are hereby waived by agreement of counsel, made at the time of caption, and need not be printed. No objection to the said depositions are to be made upon the ground that they were not filed before this date, nor because not regularly returned by the special examiners.

WILLIAM HENRY CLIFFORD,
Of Counsel for Respondents.
CHASE, BESTOW & HOLT,
Complainants' Solicitors.

PORTLAND, *Aug.* 20, 1877.

Said cause was then continued from term to term to this term, to wit, to April term, A. D. 1878, when the same was fully heard and argued by counsel before Clifford, justice, and on the 21st day of September, A. D. 1878, was entered the following:

Final decree.

MAINE DISTRICT, *ss:*

Circuit court of the United States, April term, A. D. 1878.

THE MANHATTAN MEDICINE COMPANY
v.
NATHAN WOOD ET AL.

402 The parties in the above-entitled cause having been fully heard upon the bill, answer, replications, and proofs: It is ordered, adjudged, and decreed that said bill be dismissed, with costs taxed at three hundred and twenty-three dollars and seventy-one cents ($323.71):

By the court.

Attest: A. H. DAVIS, *Clerk.*

And now, after final decree, on the day of the entry hereof, to wit, on the 14th day of May, A. D. 1879, the complainant in said cause claims an appeal to the Supreme Court of the United States, as follows:

403 *Appeal.*

Circuit court of the United States, district of Maine. In equity.

THE MANHATTAN MEDICINE COMPANY
v.
NATHAN WOOD AND JOHN T. WOOD.

To the honorable the Supreme Court of the United States:

The appeal of the Manhattan Medicine Company, the complainant and appellant above-named, respectfully showeth:

That upon the twentieth day of May, 1875, the above-named complainant filed its bill in the circuit court of the United States, district of Maine, against the above-named Nathan Wood and John T. Wood, for an injunction restraining them from infringing the complainant's trade-marks, trade-mark rights, and labels, and to recover of
404 them the sum of ten thousand dollars for their infringement of the complainant's said trade-marks, trade-mark rights, and labels, and alleging and showing in substance and effect that the complainant was, at and for a long time previous to the filing of said bill, a corporation duly organized and existing under the laws of the State of New York, and the proprietor, manufacturer, and vender of an article of medicine called "Atwood's Vegetable Physical Jaundice Bitters," first invented by Moses Atwood, of Georgetown, Mass., about twenty-five years before that time; for which article said Atwood had then adopted a certain light-yellow label having printed thereon said name, a description of said article, directions for use, and recommendations, which article the complainant and its predecessors in the same business had always been accustomed to put up and sell under said name, in twelve-sided panel bottles with the words "Atwood's Vegetable Jaun-
405 dice Bitters, Moses Atwood, Georgetown, Mass.," in raised letters blown in the glass thereof, with said labels pasted thereon to designate and distinguish the same; and whereby said article was and had been generally known and distinguished in the market, had acquired a good reputation, commanded large sales, and was a source of great profit to the complainant; and which business had been built up and the good reputation of its said article established at great labor and expense, with said name, label, and other distinguishing marks, whereby such name, label, and other marks, had become of great value and importance to the complainant, and of which business the complainant was the sole owner and had the exclusive right to the use of such name, label, and other marks. That the respondents, knowing the premises, at said Portland and elsewhere, on and previous to May 8, 1875, while the complainant was such sole and had such exclusive
406 right, without the complainant's consent, with intent to defraud the complainant and to deceive the public, did and had infringed complainant's trade-marks and business receipts, by fraudulently and unlawfully putting up and selling large quantities of another article of bitters in the likeness and similitude of the complainant's article under the same name, in the same style of bottle, with the same, or substantially the same words and letters and devices thereon, with the same, or sub-

stantially the same, labels thereon, and as and for the complainant's article, whereby the complainant suffered loss and damage to the amount of ten thousand dollars, and which sum the said bill prayed the complainant might have and recover of said respondents, and also an injunction against said respondents restraining their servants, agents, &c., from making,
putting up, selling, or disposing of any article of bitters under said
407 name, labels, or marks, or any imitation thereof; or in any similitude or likeness of the complainant's said article; that subpœnas having been issued to said respondents they appeared in said suit and filed their answers to said bill, denying, in substance and effect, the complainant's exclusive right to the use of said device of bottle, trade-marks, and labels, alleging that the same had been and were then in public and common use; that the same never constituted valid trade-marks; denying that said Moses Atwood first invented said medicine, or that the same had always been put up in the manner alleged; alleging that the same was first put up by Moses F. Atwood in connection with L. H. Bateman; alleging Nathan Wood's purchase of recipe, label, &c., from Moses F. Atwood in May, 1861, and the respondent's use thereof
since that time; the acquiescence therein of the complainant's as-
408 signors; the right and use of said label, &c., by other parties; that said label, &c., had been used by one of complainant's assignors to cover an inferior article; denying that the respondents had interfered with the complainant's business as alleged; alleging that in a suit in the supreme judicial court of Massachusetts, between said Bateman and Carter, it had been decided that Carter had not an exclusive right to said label, &c., and the respondent's right to use said label, trade-marks, &c., and praying for a dismissal of said bill; that the complainant thereupon filed its general replication to said answers; that the matter in dispute in said suit exceeds the sum of five thousand dollars, exclusive of costs; that said circuit court, on the 21st day of September, 1878, on the pleadings and on the proofs in said suit and
on arguments of respective counsel, made and pronounced a final
409 judgment and decree in said suit dismissing said bill with costs.

Wherefore this appellant appeals from the whole of said decree of said circuit court of the United States, and respectfully prays that the decree of the said circuit court and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court and every part thereof may be reversed, and a decree made according to the prayer in said bill, with costs, or such other decree as to the said Supreme Court shall seem just.

Dated the 2nd day of April, A. D. 1879.

CHASE, BESTOW & HOLT,
Solicitors for Appellant.

M. M. BUTLER, *Counsel.*

410 On reading and filing the above petition of appeal with a bond for costs,

Ordered that the said appeal be allowed.

NATHAN CLIFFORD,
Associate Justice Supreme Court U. S.

MAY 14, 1879.

And on the same day last named is filed the following:

Bond.

Circuit court of the United States, district of Maine. In equity.

THE MANHATTAN MEDICINE COMPANY, complainants,
vs.
NATHAN WOOD AND JOHN T. WOOD, respondents.

Know all men by these presents that we, the Manhattan Medicine Company, of the city, county, and State of New York, and Harrison J. Libbey, of Portland, county of Cumberland, and State of Maine, and William E. Gould, of Deering, county of Cumberland, and State
411 of Maine, are held and firmly bound unto Nathan Wood and John T. Wood, of Portland, in the State of Maine, in the sum of two hundred and fifty dollars, to be paid to the said Nathan Wood and John T. Wood, their executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this second day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas, the Manhattan Medicine Company hath taken an appeal to the Supreme Court of the United States to reverse the decree
412 rendered in the above-entitled suit by the said circuit court:

Now, therefore, the condition of this obligation is such that if the above-named The Manhattan Medicine Company shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MANHATTAN MED. CO.
B. S. BARRETT, *Treas.* [SEAL.]
H. J. LIBBEY. [SEAL.]
WM. E. GOULD. [SEAL.]

Sealed and delivered in presence of—
MARCUS P. BESTOW, to Manhattan Medicine Co.
M. M. BUTLER, to H. J. Libbey and Wm. E. Gould.
The words "and fifty" being interlined before execution.
Approved.

EDWARD FOX, *Dis't Judge.*

APRIL 2, 1879.

413 UNITED STATES OF AMERICA:

Circuit court of the United States, district of Maine.

I, A. H. Davis, clerk of the circuit court of the United States for the district of Maine, do hereby certify that the foregoing printed and written pages (numbered from 1 to 412 inclusive), are a full, true, and perfect transcript of the record and proceedings in the cause, The Manhattan Medicine Co. v. Nathan Wood et al., therein named, as the same appears of record and on file in my office.

Witness my hand and the seal of said court, this 8th day of October, A. D. 1879.

[SEAL.] A. H. DAVIS, *Clerk.*

414 The United States of America to Nathan Wood and John T. Wood, of Portland, in the district of Maine, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Maine, wherein the Manhattan Medicine Company of New York is appellant and you are defendants, to show cause, if any there be, why judgment rendered against the said appellant as in the said appeal is mentioned should not be reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this fourteenth day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

NATHAN CLIFFORD,
Associate Justice Supreme Court of the United States.

415 UNITED STATES OF AMERICA,
District of Maine, ss:

MAY 19, A. D. 1879.

In obedience to the within precept, I have this day cited and admonished the within-named Nathan Wood and John T. Wood, both of Portland, to appear at court, by delivering to each in hand a true and attested copy of the within citation.

AUG. L. SMITH,
Dep. U. S. Marshal, Dist. of Maine.

Fees: Service 2, 4.00; travel, 06; copies 2, 1.00—5.06.

(Stamp:) Maine district, ss: Office clerk, C. C. U. S. Rec'd and filed May 20, 1879. # 64.

Attest:

A. H. DAVIS, *Clerk.*

(Indorsed:) Manhattan Medicine Co. v. Nathan Wood et al. Citation.

I certify that this is the original citation filed in the cause therein named.

[SEAL.] A. H. DAVIS,
Clerk C. C. U. S., Maine District.

(Indorsed:) Sup. Court U. S., 1879, Octo. term, No. 942. The Manhattan Medicine Company, app't, vs. Nathan Wood & al. Citation & service. Filed 15 October, 1879.

(Indorsement on cover:) No. 333. The Manhattan Medicine Company, appellant, vs. Nathan Wood and John T. Wood. Maine C. C. U. S. Filed 13th October, 1879.

1 # ADDITION TO RECORD 66.

U. S. Supreme Court.

THE MANHATTAN MEDICINE COMPANY, appellant,
vs
NATHAN WOOD ET AL. } No. 66.

It is hereby stipulated and agreed that the opinion of the court below (opinion of Judge Clifford, U. S. circuit court, district of Maine) be made part of the record of the above case.

Dated September 4th, 1882.

WILLIAM HENRY CLIFFORD,
Counsel of Respondents.

PHILO CHASE,
Counsel for Appellant.

(Indorsed:) Stipulation. Opinion.

2 Circuit court of the United States, district of Maine. In equity.

THE MANHATTAN MEDICINE COMPANY
vs.
NATHAN WOOD ET AL. } No. 78.

Opinion of the court.—September 21, 1878.

CLIFFORD, J.

Equity gives relief for the infringement of a trade-mark upon the ground that one man is not allowed to offer his goods for sale, representing the goods to be the manufacture of another in the same commodity. (Seixo v. Provezende, Law Rep., 1 Chan., 195.) What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, but the rule is, that no trader can adopt a trade-mark so resembling that of another as that ordinary purchasers buying with ordinary caution are likely to be misled. (McLean v. Fleming, 6 Otto.) Two trade-marks are substantially the same in legal contemplation if the resemblance is such as to deceive ordinary purchasers, giving such attention to the same as such purchasers usually give, and to cause them to purchase the one manufacture, supposing it to be the other. (Gorham Co. v. White, 14 Wall., 528.)

3 Relief is claimed in this case upon the special grounds set forth in the bill of complaint. They are, in substance and effect, as follows:

1. That the corporation complainants for a long time have been and now are the manufacturers and vendors of an article of medicine called and known as "Atwood's Vegetable Physical Jaundice Bitters," taken internally, for the cure of jaundice and other diseases; that during all the time they have been engaged in making and sellling the articles it has been put up and sold in the same manner and with the same trade-marks, labels, and wrappers affixed thereto, in glass bottles, with twelve panel-shaped sides, having on five of the sides the raised words and letters, "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.," blown in the glass on each bottle, each bottle containing about a pint of the medicine in liquid form, labeled with a light yellow printed label, pasted on the outside, as fully set forth in the bill of complaint.

2. That the said medicine was first invented and put up for sale about twenty-five years ago by one Dr. Moses Atwood, formerly of Georgetown, Mass., by whom, his assigns and successors, the same has been ever since made and sold by the same name, in the same manner, and with the same trade-marks and description.

3. That the complainants, long prior to the alleged infringement, became the lawful, sole, and exclusive owners of the formula or recipe for making said medicine, and of the sole and exclusive right to use said name or designation therefor, together with all said trade-marks, labels, and good will of the business of making and selling said medicine.

4. That the respondents, prior to the filing of the bill of complaint at Portland, and at divers other places unknown to the complainants, have manufactured and sold, and are still manufacturing and selling, large quantities of medicine, of an inferior quality, in imitation of the article manufactured and sold by the complainants, and without their consent.

4 5. That during all that time the respondents have made, put up, and sold, and still make, put up, and sell their said imitation and counterfeit article as and for the genuine article of the complainants, so put up, marked, and labeled that it is very difficult to be distinguished from the complainant's genuine article.

6. Based on these allegations, the complainants pray for an account and for an injunction restraining the respondents from affixing or applying to any article of medicine manufactured, sold, shipped or supplied by them, or to the bottles or packages in which the same is put up, the complainants' trade-mark words, to wit, "Atwood's Vegetable Physical Jaundice Bitters," or either of said words, or any imitation thereof.

Service was made, and the respondents appeared and filed an answer, setting up several defenses to the following effect:

1. They admit that the complainants purchased all the right, which the parties named in the answer owned, to prepare the Atwood Bitters, but they deny that those parties held or possessed the exclusive right to manufacture the same, or any exclusive right whatever to the same, or any exclusive right to any trade-mark, label, or wrapper, consisting of a glass bottle with panel-shaped sides, and with the raised words and letters, "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass.," blown in the glass; nor did they possess any exclusive right to the preparation of the medicine in a liquid form, or to the light yellow printed label pasted to said bottle, upon which were the words, "Atwood's Vegetable Physical Jaundice Bitters." Nor did they possess any exclusive right to the residue of what is printed upon the label, and set forth in the bill of complaint.

2. That the twelve-panel bottle, the yellow label, the words "Atwood's Bitters," together with the other words alleged to be printed on said label, were in public and common use by a large number of manufacturers.

5 3. That the complainants did not purchase and do not now own the exclusive right, nor the entire right, to said bottle, label, and words, or either of them, as alleged, because their said assignors were not the exclusive proprietors of the same, and therefore could not sell and dispose of what they did not own.

4. They deny that Moses Atwood first invented and put up the said medicine for sale, and allege that it was first put up by Moses F. Atwood, of Georgetown, Mass., in connection with L. H. Bateman, not in a paneled bottle, but in a smooth, round bottle, without panels; that the round bottle used by Bateman had no words blown in the glass, and that the bottles which contained words blown in the glass were rectangular in form and without panels, and that Moses Atwood first used a white label and a round bottle having no panels or blown letters.

5. That Moses F. Atwood, and not Moses Atwood, first obtained the formula for the medicine from some physician to these respondents unknown, and prepared the same according to the formula, and not according to any invention of himself or of said Moses Atwood; and that subsequently thereto the medicine put up by him and Bateman began to be called "Atwood's Bitters."

6. That the respondent first named, in May, 1861, purchased the recipe for the medicine, and the right of using the bottle and label; that he has a right to use the same, and that no person has ever pretended to interrupt him in such use prior to the present suit.

7. That L. F. Atwood, the brother of Moses Atwood, also had a right to use the said label and bottle, and that he sold such a right to H. H. Hay, of Portland, who uses the same on the bottles containing the medicine.

6 8. That they have been in the practice of preparing the medicine under the recipe bought of Moses F. Atwood, for the period of fourteen years, and that they have spent large sums of money in advertising the medicine and in creating a market for the same.

Proofs were taken on both sides, and the evidence is voluminous and somewhat conflicting. Any discussion of the legal questions arising in the case would not be of much advantage until the facts are ascertained, which will be best accomplished by distinct findings.

Pursuant to that view, the court finds as follows:

1. That Moses Atwood, Georgetown, Mass., commenced preparing the medicine in question nearly forty years ago; that for a time the formula of the ingredients was a secret, and that he soon began to designate the preparation as his medicine more frequently than otherwise, designating it as Moses Atwood's Bitters or as Moses Atwood's Jaundice Bitters, and sometimes as Atwood's Vegetable Jaundice Bitters. There is no direct proof that he ever adopted any distinct trade-mark, but the evidence of use is such as to warrant the conclusion that he considered the latter designation as representing the article which he manufactured and put up for sale. For a time no other person had any interest in the business, and throughout all that period he put the article up in round, smooth bottles, without panels or raised words or letters of any kind. Others sub-

sequently acquired an interest in the business with him, among whom were his brother and L. H. Bateman, and the person who subsequently joined with him in the conveyance to Carter and Dodge. His son, Moses F. Atwood, had worked with him and Bateman at Georgetown in preparing the medicine under the recipe and knew the ingredients of which it was compounded. He, the son, went to work with Bateman in 1860, and he states that they used a fluted bottle, containing the name of the medicine and that of his father and his place of residence blown into it.

7 2. That large rights in respect to the business remained in Moses Atwood, notwithstanding the interests in the same acquired by others; that January 1, 1848, he entered into a written contract with Moses Carter, by which he sold to the latter bills against local agents in many places in Massachusetts, Rhode Island, Connecticut, and New York, and the right to sell the medicine in those places, under the terms and conditions following: That he, the manufacturer, should not sell the medicine in those places so long as the other party supplied customers there; that he, the proprietor, agreed to make the bitters during ten years for seventeen dollars per barrel, to be delivered in the State where the same were made, three quarters of the money to be advanced by the other contracting party.

3. Carter and Benjamin S. Dodge, February 2, 1852, formed a copartnership, which, of course, consisted of two parts, but they subsequently took into the firm C. L. Carter, and by interlineations made the articles consist of three parts. They formed the copartnership for making and vending Atwood's vegetable medicines and essences. Enough appears to afford an inference that a prior agreement between Moses Carter and Dodge of the one part, and Moses Atwood of the other, had been made, as the record shows that Atwood and Bingham and Carter and Dodge, September 29, 1852, entered into a contract to settle doubts and supply omissions in the supposed antecedent agreement, which was not introduced in evidence.

4. By the contract introduced, Moses Atwood and his partner conveyed to Carter & Dodge the right to use said Atwood's name on the labels and circulars, and to manufacture and sell "Atwood's Vegetable Jaundice Bitters," and certain other articles, on the ground hereinafter described, and not to sell by themselves or their agents in any other portion of the world, or sell to others to sell, except on the ground hereinafter described. Massachusetts is named, with numerous excepted

8 towns and parts of towns. Towns and places are also excepted from New York. Seven towns are also excepted from New Hampshire; and all of the State of Maine, except the towns of Kittery, South Berwick, and Lebanon. Other exceptions are made in the same instrument not necessary to be noticed in this investigation. Attempt was made to prove by parol the prior agreement referred to in the contract, and with that view reference was made in argument to the cross-examination of Luther F. Carter, who states that there were papers executed to Carter & Dodge, giving them the right to manufacture the bitters, using Moses Atwood's name, but that he knew nothing about the bottle. When asked if those papers came into his possession he answered that he didn't know that they ever did. He was then asked, "If they were ever in your hands, to whom did you deliver them?" And his answer was, "If they were

ever in my hands I delivered them to Eli B. Johnson," the record showing that the person named was the agent of the complainants. Taken as a whole, the court is of the opinion that the evidence was not sufficient to admit parol testimony of the contents of the instrument, nor would it benefit the complainants if the rule was otherwise, as the witness states that he does not know that the paper or papers conveyed anything more to Carter & Dodge than the right to put up the medicine and use Atwood's name; nor does the record contain any evidence tending to show that the original proprietor ever gave them the right to sell the medicines in any of the places excepted out of the contract introduced in evidence.

5. That parol evidence was introduced tending to show that Carter & Dodge owned, at the time of their dissolution of copartnership, all the right in Atwood's Bitters to manufacture and sell the same, except what Atwood had reserved; but there is no evidence that he ever conveyed to them any right to put up or sell the same in the places reserved, nor is there any evidence tending to show how, if ever, he acquired the interest in the same at one time held by his brother and Bateman.

6. Suggestions were made in argument that Moses Atwood, in the year 1855, conveyed to Carter & Dodge, or Carter, Dodge & Co., his entire interest in the business, except his right to sell the medicine beyond Illinois. What a party does not own of course he cannot sell, and that is a sufficient answer to the proposition, so far as respects the interests which had become vested in others; but the supposed sale might apply to some of the excepted places, not to all, as the same witness admits that Carter & Dodge did not own what Mr. Atwood had reserved, but he says that he once saw the agreement last referred to, and, when asked if he had made search for it, stated that he had made diligent search for it among his father's old papers. It was about the time that Carter, Dodge & Co. brought the suit against Bateman that he saw the paper, and he says he has not seen it since that time. According to his statement the paper was from Moses Atwood to Carter, Dodge & Co. Carter & Dodge sued Bateman for putting up and selling the medicine and using the trade-mark, and he prevailed in the suit; and yet no search was made among the papers of Mr. Dodge. For aught that appears to the contrary, it may be among his papers, or in the hands of the attorneys in that suit, or in the files of the clerk's office.

Two objections are taken to the evidence, both of which may be sustained:

First. That sufficient search is not shown to admit it.

Second. That if it is admitted it has no tendency to show that the conveyance included Maine, or any other of the excepted places; nor does it appear that the grantor reacquired the interests previously vested in other persons.

Localities almost without number were excepted out of the general grant, and the uncontradicted proof is, that the original proprietor made reservations in favor of his father, Levi Atwood, and his brother, Levi F. Atwood, of Maine and part of New Hampshire.

7. Viewed in the light of these suggestions, the court finds that Carter & Dodge never acquired the right to put up and sell the medicine in Maine, or in any of the places excepted out of the grant from the original proprietor, nor did they ever acquire the right or title to any of the

same reservations in favor of other parties. Trade-marks are an entirety, and are incapable of exclusive use at different places by more than one independent proprietor, for the reason that the party seeking redress, in order to establish an exclusive right to the trade-mark, must show that he had an exclusive right in the commodity to which it is attached. Upton on Trade Marks, 24; Canham v. Jones, 2 Ves. & B., 218. Throughout the largest portion of the period since 1842, Bateman, or his son, who succeeded him, put up and sold Atwood's Bitters in the same town with the original proprietor, and the proofs show that he put the medicine up in half-pint glass bottles, with the words "Atwood's Jaundice Bitters, Moses Atwood, Georgetown, Mass.," blown upon the bottles; that when the proprietor removed, in 1855, he left with Bateman his original recipe for the manufacture of Atwood's Bitters, with all the medicines which he manufactured and sold. Little or nothing was made in the business during the life-time of Bateman; and when he died, his son succeeded to and continued in the business until the heirs transferred the same to the complainants. For a few years, Carter & Dodge put up and sold the medicine, in accordance with the course pursued by the original proprietor, when they took into the firm the son of the senior partner, C. L. Carter, and continued to transact the business under the name of Carter, Dodge &
11 Co., two or three years longer. When they dissolved, and Dodge went out, the new firm, called Carter & Son, consisting of Moses Carter and C. L. Carter, took control of the business, and they continued the same for about five years. Subsequently, another son of the senior partner joined the firm, and they continued the business for two or three years under the firm name of Carter & Sons. Lastly, the father and the elder son went out, and Luther F. Carter took the firm name of Carter & Son, and continued the business until he sold to the complainants. After Carter & Dodge dissolved in 1855, Dodge went to Rowley and put up and sold the medicine there for five years, using the Atwood labels. On the 4th of September, 1867, he sold and conveyed the right to manufacture and sell Atwood's Bitters to William B. Dorman for the term of five years from the date of the agreement, with the right to use the trade-marks he had previously used in the sale of the same. Before that period expired the same party sold the same right to Noyes Manning, now of Mystic, Conn., with authority to use the same labels.

8. That Carter & Son had two kinds of labels used on the bottles which they put up for sale. On the top of one of the labels the words "Carter's are the only genuine" were printed, and below the directions, the words, "Manufactured by M. Carter & Son, successors to Moses Atwood, Georgetown, Mass.," were also printed. At the bottom of the label were also printed the words "Caution.—Observe that our name is blown in the bottle, and on the revenue stamp. None others are genuine." The label also bore the words "Atwood's Vegetable Physical Jaundice Bitters." Two kinds of bitters were put up at their place. One kind, under the label described, which was the genuine "Atwood's Vegetable Physical Jaundice Bitters," sold in the market, at wholesale, for twenty-seven dollars per gross; the other kind was an inferior article, an imita-
12 tion of the genuine, sold in the market at fifteen dollars per gross, bearing the genuine original label of Atwood's Bitters, with the "e" left out in the word "the" preceding the words United States. Car-

ter's traveling agents never sold any but the genuine article, the imitation being disposed of by Carter alone. In most instances the two kinds were retailed at the same price, but when both kinds were known the genuine brought a higher price.

9. That Bateman had the original recipe, and that Moses F. Atwood, the son of the original proprietor, when in the employment of Bateman as a selling agent sold the recipe for compounding and preparing the Atwood Bitters in the State of Maine to Nathan Wood, in 1861. When asked whether the conveyance was in writing he said it was, and that each party had a copy, and that he sold to the respondent the right to manufacture the bitters and sell the same in the State of Maine and elsewhere. Proof that the grantor had authority from the actual proprietor to execute the conveyance is not shown in the record; but it is shown that the purchaser, with his partner, has continued to prepare, put up, and sell the medicine from the date of the purchase of the recipe to the date of the bill of complaint without hindrance or interruption, with the exception of the two instances mentioned in the second answer, since the organization of the complainant corporation. None of the grantors of the complainants ever disputed their right to compound, put up, and sell the bitters in question, nor is there any evidence tending to show that the bitters which they sold were not the genuine Atwood Bitters. Their grantor possessed the genuine recipe, and the proofs are full to the point that it was the genuine recipe which he sold to the respondent Nathan Wood. Beyond all doubt the respondent Nathan Wood acquired the recipe, which, not being the subject of a patent, might lawfully be used by any one who pos-
13 sessed the secret; and it is equally certain that he supposed that he had acquired the right to use the labels, as he purchased the right to use the same of the son of the original proprietor, and of the selling agent of Bateman, whose title to put up the medicine and use the labels was subsequently established by judicial determination.

10. Unlike what is usual in controversies respecting trade-marks, the complainants in this case, instead of using a trade-mark of their own adoption, allege an attempt to prove that the trade-mark in question was adopted by the original proprietor of the medicine, and that they have acquired the title to the same by certain mesne conveyances set forth in the record; and the court finds upon the subject as follows:

1. That they, or their predecessors, January 1, 1875, acquired, by assignment, whatever right in the same belonged to the heirs and representatives of L. H. Bateman.

2. Also, March 18, in the same year, whatever right belonged to the firm of Noyes & Manning.

3. Also, March 30, in the same year, whatever right belonged to Benjamin C. Dodge.

4. Also, March 30, in the same year, whatever right belonged to William B. Dorman.

Also, April 12 and 19, in the same year, whatever right belonged to the Carters in the said trade-mark.

None of these instruments of conveyance, however, convey, or profess to convey any greater rights to the complainants than those which were previously held by Carter & Dodge; and it is clear that Carter & Dodge never acquired from the original proprietor any right to put up or sell

the medicine in Maine, or to use the labels of the original proprietor in that State, out of the three towns specified in the written agreement, which constitutes the evidence of their title.

Nothing remains to be done in the case of much importance, except to state the conclusions of law and fact resulting from the findings of the court:

14 1. Examined in the light of the findings, as the case must be, it is clear to a demonstration that the complainants have no exclusive right to put up and sell the medicine, nor any exclusive right or title to the labels, which belonged to the original proprietor.

2. That all they claim in respect either to the medicine or the labels, is the right to the same which was held by Carter & Dodge, who never possessed the right to put up the medicine or to use the labels in any part of Maine, except the three towns named in the said written agreement.

3. That the rights of certain of the assignors of the complainants, if any they ever had, were forfeited long before the supposed transfer under which the complainants claim, by the use of the trade-mark as a means of misrepresentation and deception to the public, by putting up a spurious article, and using the genuine trade-mark to promote the sale of the spurious article. Misrepresentation and deceit of the kind divest the guilty party of all title to the same, and it follows that a party who has forfeited his property in the same cannot convey any title to another. Phalon v. Wright, Cox American Trade Marks, 311; same case, 5 Phil., 464; Perry v. Truefitt, 6 Beavan, 66; Pedding v. How, 8 Simon, 47; Hobbs v. Francais, 19 How. Pr., 567; Partridge v. Menck, 1 How. Cas., 547; Fetridge v. Wells, 4 Abb. Prac. R., 144; Flavell v. Harrison, 19 Eng. L. & Eq., 15. Equity will not decree for an account of past gains and profits where there has been laches in bringing the suit and long acquiescence in the use of the trade-mark by others, and especially not where the acquiescence covers a period of fourteen years. McLean v. Fleming, 6 Otto, 1; Harrison v. Taylor, 11 Jurist (n. s.). 408; Holt v. Couston, 3 Beavan, 580; Edelsten v. Edelsten, 1 DeGex, Jones, and Smith, 185; Estcourt v. Estcourt, 1 Law Rep., 10 Chan., 276.

4. That the assignors of the complainants forfeited all their
15 property, if any, in the trade-mark belonging to the original proprietor by a disregard among themselves of their several allotted districts after the grant or license from the original proprietor, by trespassing upon each other and misuse of the trade-mark.

5. That the grantees or licensees of the original proprietor, and their successors, forfeited the right to the original trade-mark of their grantor or licensor by the voluntary relinquishment of the bottle, label, and directions which he used before the transfer, and by the adoption of new and different labels, &c., of their own substitution, one or more of whom put up and sold a spurious article of medicine under the genuine label, and used a different label of his own invention on bottles containing the genuine medicine. Cases arise where the title is complete when a party, though not entitled to a decree for an account, may still be entitled to a decree to prevent future infringements; but the difficulty in the way of the complainants in this case is incurable, as the evidence shows that the respondents have the genuine recipe, which is not protected by any patent, and the

complainants have not any exclusive right to the use of the label, and no right at all to the use of it in the State of Maine.

Bill of complaint dismissed with costs.

U. S. A., *Maine District, ss:*

I, A. H. Davis, clerk of the circuit court of the United States for said district, do hereby certify that the foregoing is a true copy of the original opinion of Mr. Justice Clifford rendered in the cause herein named.

Witness my hand and the seal of the said circuit court this twenty-third day of September, A. D. 1882.

[SEAL,] A. H. DAVIS, *Clerk.*

(Indorsed:) Supreme Court U. S., 1882. October term. No. 66. The Manhattan Medicine Co., app't, vs. Nathan & Jno. T. Wood. Stipulation of counsel & addition to record. Filed 28th September, 1882.

(Stamp:) Office Supreme Court U. S. Filed Sep. 28, 1882. James H. McKenney, clerk.

3591——2

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108-218

FILED
OCT 2 1882

Supreme Court

OF THE UNITED STATES.

IN EQUITY.

THE MANHATTAN MEDICINE CO.

Appellant.

vs.

NATHAN WOOD, ET. AL.

Respondents.

APPELLANT'S BRIEF.

PHILO CHASE,

Counsel for Appellant.

NEW YORK:

BARRETT & Co., Print, 62 Vesey St., N. Y.

Supreme Court

OF THE UNITED STATES.

THE MANHATTAN MEDICINE COMPANY,
Appellant.

vs.

NATHAN WOOD AND JOHN T. WOOD,
Respondents.

Appellant's Brief.

STATEMENT.

This is an appeal from a decree of the Circuit Court of the United States for the District of Maine dismissing the bill of complaint.

The suit is brought by the appellant, The Manhattan Medicine Company, a New York State corporation and citizen, against the appellees, Nathan Wood and John T. Wood, copartners, doing business at Portland, Maine, under the style of Nathan Wood & Son, both citizens of the last named state, for an injunction restraining them from infringing the appellant's trade mark rights of its article of bitters called, Atwood's Vegetable Physical Jaundice Bitters, for an accounting, and for $10,000, damages of infringement.

The decree appealed from was rendered upon the pleadings and proofs.

The court below dismissed the bill of complaint on the ground that the appellant had no exclusive rights to the trade mark rights in question.

The trade mark rights in controversy are;

1.—The name of the appellant's article, viz; "Atwood's Vegetable Physical Jaundice Bitters."

2.—The particular style of lettered bottle used by the appellant for the article, viz: a 12 sided glass bottle of the dimensions used by the appellant in connection with the words, "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass." blown thereon in raised letters.

3.—The yellow printed paper label used by the appellant on its bottle.

The name, lettered bottle, marks and labels in question are shown by complainants' Bottle, "Exhibit A. February 14, 1876."

The alleged infringement consists in the use by the appellees with their article of bitters, of the same name and substantially the same style and kind of lettered bottle, and label as those used by the appellant above named.

The appellees' infringing article is put up and sold by them in the two different shapes shown by complainants' Bottle Exhibits marked "Complainants' Exhibit B. February 14, 1876," and "Exhibit C. February 19, 1876."

The appellees' article put up in the manner of Exhibit B. is a very close imitation of the appellant's article in respect to name, style of lettered bottle and label; the general appearance is the same; there are some differences, but these are so slight as to escape the notice of ordinary purchasers; it is so like the appellant's article in general appearance

as to be ordinarily taken therefor; it is well calculated to deceive purchasers generally; there can be no serious question as to that.

The appellees' article put up in the manner of Exhibit C. is also an imitation of the appellant's article, it is claimed, in respect to name and label, though not so close an imitation as the other, but close enough to deceive, as shown by the testimony of experienced witnesses.

The main contention in the case, however, is as to the exclusive right of the appellant to the use of the trade mark rights in question, that is, to use in connection with its article of bitters, the name, style of lettered bottle, and label used now by it as above described; this is the principal question involved.

The appellant claims such exclusive right, on the grounds:

1.—That such name, style of bottle and label were originated and adopted by its predecessors, many years ago, for the purpose of designating and distinguishing its said article of bitters from all others of a similar character.

2.—That such name, style of bottle and label in their nature, were and are capable of designating and distinguishing its said article from all other articles of a similar character, and have always so served to designate and distinguish its article, and are therefore good trade marks for it.

3.—That by the sale and transfer to the appellant of all the business of manufacturing and selling said article together with all the good will and trademark rights belonging thereto by their original and succeeding owners, it has become the exclusive owner thereof.

The appellees claim that the appellant has no such exclusive right on the grounds;

1.—That no transfer of such trademark rights is proved from Moses Atwood, the original proprietor.

2.—That such trademark rights have been forfeited to the public by user of different persons.

3.—That the same have been forfeited to the public by misuse by one of the appellant's grantors.

4.—That the defendants have acquired a right to said trademark rights by purchase of the recipe from the son of Moses Atwood, the original proprietor.

(See answer, Rec. pp. 6—11.)

The origin and history of the name, style of bottle and label in question are as follows:

About 40 years ago, Moses Atwood then of Georgetown, Mass. first began to prepare, put up and sell the appellant's article of bitters. Atwood put up the article in a smooth round 8 ounce glass bottle such as bottle sample "Plaintiff's Exhibit F." March, 29, 1876.

(Rec. pp. 54, 62, (q. 74,) 83, 142.)

Atwood, to designate and distinguish his article, devised and adopted therefor, the name and label in question, which were always used by Atwood for his bitters, and have been so used by his successors ever since.

The bottle device in question was the invention of Carter, Dodge & Co. the immediate successors of Atwood, about the year 1855, and has been used by them, and their successors ever since.

(Rec. pp. 55, 57, 58, 65, 92, 93.)

Atwood was the manufacturer of a number of other medicines, besides the bitters, originated by him and called respectively, "Atwood's Vegetable Dysentery Drops, Atwood's Vegetable or Spinal Elixir, Atwood's Vegetable Canker Drops, Atwood's Compound Concentrated

Extract of Sarsaparilla," etc. These medicines were designated and distinguished each by its particular name, style of bottle and label.

(Rec. pp. 84, 92, 97, 102.)

In the year, 1855, Atwood, in consideration, of a large sum of money paid him by a firm at Georgetown, Mass., by the name of Carter, Dodge & Co., sold and transferred to them all his medicine business including the bitters and other medicines, together with all his stock of medicines on hand, medicine materials, bottles, labels, implements, machinery, good will, the right to use his name, trademarks, and all the rights belonging to the business, excepting and reserving to himself the right to manufacture and sell, if he chose so to do in a portion of the West, whither he was then about to remove his residence.

(Rec. pp. 142, 55, 67, 69, 77, 85, 95.)

Thereafter, Atwood never exercised nor claimed any right or interest in any of the business, property, or rights so transferred by him to Carter, Dodge & Co., but always recognized and admitted their ownership thereof.

Thereafter Carter, Dodge & Co., carried on said medicine business. Under Atwood it had been extensive and under Carter, Dodge & Co., it became much more so, their sales and business, especially of the bitters, extending over nearly every part of the country.

(Rec. pp. 60, 62, 139.)

Nobody ever questioned the exclusive ownership of Carter, Dodge & Co., to said Atwood medicine business, or their right to the exclusive use of the Atwood labels and other trademark rights, except that one L. H. Bateman of Georgetown, Mass.,

claimed the right to use said labels etc., with Carter, Dodge & Co., by virtue of some alleged previous arrangement with Atwood. Carter, Dodge & Co., at first disputed this claim of Bateman and commenced suits to enjoin him, but failed to prosecute them and became non-suit. Bateman continued to use the Atwood labels, etc., with Carter, Dodge & Co., always recognizing their exclusive right as against everybody but himself.

Previous to this transfer by Atwood to Carter, Dodge & Co., of his medicine business in 1855, Atwood had, at different times, made certain contracts with Carter alone and Carter and Dodge together, with respect to his medicine business whereby he had licensed them to sell, in certain places and upon certain conditions, as will be seen by the contracts in evidence.

(Rec. pp. 137, 139.)

These contracts tend to show the origin and use of the trademarks in question.

The firm of Carter, Dodge & Co. carried on the business of manufacturing and selling the Atwood medicines for about three years and then dissolved.

(Rec. p. 184).

The firm of Carter, Dodge & Co. consisted of Moses Carter, Benjamin S. Dodge and Charles L. Carter, the latter being the son of Moses Carter.

(Rec. p. 84).

Carter, Dodge & Co. upon dissolving their partnership, agreed among themselves to thereafter carry on said medicine business individually, each to use the Atwood name, labels, etc., as the firm had theretofore done. (Rec. pp. 56 and 86).

There was also some understanding that the Carters should sell the medicine upon certain ter-

ritory and that Dodge should sell upon certain other territory.

The latter agreement proving impracticable, was subsequently abandoned by mutual consent.

(Rec. p. 79).

The Carter family, that is, Moses Carter and his sons, carried on the Carter branch of the business down to the time of the transfer to the appellant in 1875; first, Moses Carter and his son, Charles L. Carter under the name of M. Carter & Son, for about five years, then Moses Carter and his sons, Luther F. Carter and Moses F. Carter, under the name of Carter & Son, for two or three years, and then Luther F. Carter.

(Rec. p. 56.)

After the dissolution of Carter, Dodge & Co., the Dodge branch of the business was carried on as follows: first, by Benjamin S. Dodge, for about five years, and then by his successors, William B. Dorman and Noyes & Manning, down to the transfer by them to the appellant in 1875.

(Rec. pp. 57, 58, 92, 93).

Carter, Dodge & Co., and their successors, the Carters, Dodge, Dorman, Noyes & Manning, always used the Atwood receipts, names and labels in compounding and putting up the Atwood medicines.

(Rec. pp. 55, 56, 58, 85, 86, 92, 93).

The Carters, in consequence of the contest with Bateman, further distinguished their Bitters by adding the Carter name to the labels.

(Rec. p. 57.)

Bateman, also, for the same reason, distinguished his bitters by printing his name on the label. (Id.)

At the beginning of the year, 1875, the title of the Atwood medicine business stood in Luther F. Carter, William B. Dorman and Noyes & Manning, (said parties being the successors of Carter, Dodge & Co.), and the Bateman heirs. All those several parties, by proper instruments of conveyance, duly conveyed to the appellant all their respective rights, titles and interests therein; the Bateman heirs, January 1, 1875, Noyes & Manning, April 21, 1875, William B. Dorman, March 30, 1875, and Luther F. Carter, April , 1875.

(Rec. pp. 23, 25, 28, 143.)

The appellant, about the same time, as a matter of precaution in assuring the title, also took assignments and releases from Benjamin S. Dodge, and the other Carter heirs, of whatever rights or interests they might possibly have in said medicine business, rights and property.

(Rec. pp. 27, 28, 29).

By virtue of these several conveyances, the appellant became the owner of all the business of manufacturing and selling the bitters in question, together with all the good will, trademarks, and other rights thereto belonging, which embraced the name, lettered bottle, and label in question.

The claim of the defendants to use the Atwood name, lettered bottle, and label in question, is based upon the alleged purchase by Nathan Wood from Moses F. Atwood, son of Moses Atwood, the original proprietor, of the recipe for making his father's bitters.

The facts with regard to this alleged purchase, as shown by the record are these: In the year 1861, young Atwood sold, or pretended to sell, to Nathan Wood, the recipe for making his father's Bitters. Whether or not the recipe communicated by young

Atwood to Wood was, in fact, the genuine recipe for making the Moses Atwood Bitters, does not appear by the evidence. Young Atwood never had, nor claimed or pretended to have any right, title or interest whatever in Moses Atwood's Bitters, or other medicines, or in any of the trademarks thereof.

(Rec. pp. 203, 217, 142, 59, 93, 106, 107).

About the year, 1861, young Atwood, then about 21 or 22 years of age, worked for Bateman as his hired man by the day, but had no interest in the medicine business. (id.) Moses Atwood never gave his son any right to sell his recipe, neither did Bateman. What Wood paid young Atwood does not appear; both he and Wood refuse to tell.

(Rec. pp. 181, 182, 204, 205).

Wood always knew, or had good reason to know, that young Atwood never had any right, title or interest in the Moses Atwood Bitters business, and that his purchase of such recipe was a fraud upon his employer, Bateman, as well as upon Carter, Dodge & Co.

The Woods make use of the appellant's name, style of bottle and label, for the purpose of selling their article of bitters as the article of bitters sold by the appellant and their predecessors.

In their trade, whenever the appellant's bitters are specially called for, the defendants supply their article put up in shape nearest to resemble the appellant's article, viz.: Bottle Exhibit A. (Rec. p. 178.)

All the reputation and value of the trademarks in question, have been given to them by the appellant and its predecessors.

These trademarks, when the defendants began to infringe them, had been used for more than twenty years, to designate and distinguish the appellant's article; by them the article was everywhere known

and recognized, and had currency and reputation; they had become exceedingly valuable, as the business of manufacturing and selling the article depended upon them; a very large amount of money had been expended in advertising and building up the business under them.

The appellant assigns as errors of the court below the following

ERRORS OF FACT.

1.—That the record does not "contain any evidence tending to show that the original proprietor ever gave them," (Carter, Dodge & Co.) "the right to sell the medicine in any of the places, excepted out of the contract introduced in evidence."

(Part of 4th finding of fact.)

2.—That his, (Moses Atwood's,) brother acquired an interest in the business.

(Part of 1st finding of fact.)

3.—That "there is no evidence that he," (Moses Atwood,) "ever conveyed to them," (Carter, Dodge & Co.,) "any right to put up or sell the same in the places reserved, nor is there any evidence tending to show how, if ever, he acquired the interest in the same at one time held by his brother." etc.

(Latter part of 5th finding of fact.)

4.—That sufficient search was not made to admit parol evidence of the instrument of sale and transfer from Moses Atwood to Carter, Dodge & Co.;

That "no search was made among the papers of Mr. Dodge, that for aught that appears to the contrary, it may be among his papers, or in the hands

of the attorneys in that suit, or in the files of the Clerk's Office."

(Part of 6th finding of fact.)

5.—"That if it" (said instrument,) "is admitted, it has no tendency to show that the conveyance included Maine, or any other of the excepted places; nor does it appear that the grantor re-acquired the interests previously vested in other persons."

That "Localities without number were excepted out of the general grant, and the uncontradicted proof is that the original proprietor made reservations in favor of his father, Levi Atwood, and his brother, Levi F. Atwood of Maine and part of New Hampshire."

(Latter part of 6th finding of fact.)

6.—"That Carter & Dodge never acquired the right to put up and sell the medicines in Maine, or in any of the places excepted out of the grant from the original proprietor nor did they ever acquire the right or title to any of the same reservations in favor of other parties."

(First part of 7th finding of fact.)

7.—That Carter & Son sold an imitation of the genuine bitters, etc.

(Part of 8th finding of fact.)

8.—That Moses F. Atwood sold and assigned to Nathan Wood the genuine recipe for compounding the Atwood Bitters.

(Part of 9th finding of fact.)

9.—That "none of the grantors of the complainants ever disputed their, (defendants') right to compound, put up and sell the bitters in question, etc., nor is there any evidence to show that the Bitters,

which they sold were not the genuine Atwood Bitters. Their grantors possessed the genuine recipe, and the proofs are full to the point that it was the genuine recipe, which he sold to the respondent, Nathan Wood."

(Part of 9th finding of fact.)

10.—"That it is equally certain that he supposed that he had acquired the right to use the labels," etc. (Part of 9th finding of fact.

11.—That, "it is clear that Carter & Dodge never acquired from the original proprietor any right to put up or sell the medicine in Maine, or to use the labels of the original proprietor in that state, out of the three towns specified in the written agreement which constitutes the evidence of their title."

(Part of 9th finding of fact.

12.—That the Court below did not find, as it ought to have found to the contrary of its findings, above specified.

13.—That the Court below did not find, as a fact, as it ought to have done that the particular style of bottle claimed by the appellant, viz.: the twelve sided bottle, with the marks, and raised letters blown in the glass, was originated, and adopted by Carter, Dodge & Co., and became their property and right.

ERRORS OF LAW.

1.—"That the complainants have no exclusive right to put up and sell the medicine nor any exclusive right or title to the labels which belonged to the original proprietor.

(1st finding of law.)

2.—"That Carter & Dodge never posessed the right to put up the medicine or to use the labels in any part of Maine, except the three towns named in said written agreement."

3.—"That the rights of certain of the assignors of the complainants, if any they ever had, were forfeited long before the supposed transfer under which the complainants claim by the use of the trademark as a means of misrepresentation and deception to the public, by putting up a spurious article and using the genuine trademark to promote the sale of the spurious article."

(3d finding of law.)

4.—"That the assignors of the complainants forfeited all their property if any, in the trademark belonging to the original proprietor, by a disregard among themselves of the several allotted districts, after the grant or license from the original proprietor by trespassing upon each other and misuse of the trademark."

(4th finding of law.)

5.—That "the grantees or licensees of the original proprietor, and their successors, forfeited the right to the original trademark of their grantor, or licensor, by the voluntary relinquishment of the bottle label and directions which he usedin and before the transfer, and by the adoption of new and different labels, etc., of their own substitution, one or more of whom put up and sold a spurious article of medicine, under the genuine label, and under a different label of his own invention, on bottles containing the genuine medicine."

(Part of 5th finding of law.)

6.—That "the complainants, have not any exclu-

sive right to the use of the label, and no right at all to the use of it in the State of Maine."

(Part of 5th finding of fact.)

FIRST POINT.

The record shows that the original proprietor, (Moses Atwood,) gave Carter, Dodge & Co., the right to sell the medicines, "in places excepted out of the contract introduced in the evidence," contrary to the finding of the Court in its 4th finding of fact; that he, (Moses Atwood,) did convey, and sell the same in the places reserved, contrary to its finding, in its 5th finding of fact; that Carter & Dodge did acquire the right to put up and sell the medicine in Maine, "and in places eccepted out of the grant from the original proprietor," contrary to the finding of the Court, in its 7th finding of fact; that Carter, Dodge & Co. did acquire from the original proprietor, the right to put up and sell the medicines in Maine, and to use the labels of the original proprietor, in that State, out of the three towns specified, contrary to the finding of the Court in its 9th finding of fact.

I.—The Court below fell into the error of supposing that the contract, between Moses Atwood, and Carter & Dodge, dated September 29, 1852, (Rec. p. 139), was the evidence of Carter, Dodge & Co's title to the medicine in question. This contract was made as it shows on its face, to settle some doubts, and supply some omissions in an agreement in two parts, dated, December, 25, A. D. 1851, etc. This, as well as the previous contract between Moses Atwood, and Moses Carter, were in the nature

of licenses, to sell in certain places, upon certain conditions, and transfers of certain medicine accounts, etc.

It was not under these contracts, that Carter, Dodge & Co, claimed title to the Moses Atwood medicine business, but under the sale, and transfer to them, by Moses Atwood, in the year, 1855, of all his medicine stock, materials, labels, bottles, good will, trademark rights, and all the rights belonging to the business.

These contracts of 1848 and 1852, were not put in evidence, for the purpose of proving the title of Carter, Dodge & Co., but mainly for the purpose of showing the origin, and uses of the trademarks, that is, that the name and label in question, were first originated and used by Moses Atwood.

The defendants in their answer, and in their affidavits used on the injunction motion, claimed that said medicine, and trademarks, originated with Moses F. Atwood, the son, and not with Moses Atwood the father.

(Answer, Rec. pp. 8 and 9, etc.)

These contracts by their dates, and contents showed conclusively that the medicine, name, labels, etc., originated with Moses Atwood, as claimed by the appellant, and not with Moses F. Atwood, his son, as claimed by the defendants; they also tended to show in connection with other evidence, that the name and label first used by Atwood were the same always used by him and all of his successors down to the appellant, covering a period of 35 years. The court below erroneously treated these contracts as the sole evidence of the title of Carter, Dodge & Co.

II.—The title of Carter, Dodge & Co. to the Atwood medicine business in question is proved by the uncontroverted fact that Carter, Dodge & Co.

and their successors were in the open uninterrupted possession and enjoyment thereof for more than 20 years and down to the transfer to the appellant. Carter, Dodge & Co., went into the possession and enjoyment of the Atwood medicine business including Atwood's stock of unsold medicines on hand, medicine materials, labels, bottles, etc. and medicine bills in 1855, (Tes. B. S. Dodge, Rec. pp. 83, 84, 85, 100. tes. of L. F. Carter, Rec. pp. 55, 69, 77; tes. of Moses Atwood, rec. p. 142.)

From 1855 down to 1875 Carter, Dodge & Co., and their successors continued in the possession and enjoyment of the Atwood medicine business. (Tes. Carter, Rec. p. 53. *et seq.*; tes. Dodge, Rec. p. *et seq.;* tes. Dorman, p. 104 *et seq.;* tes. Howe, Rec. p. 129; tes. Purker, Rec. p. 133; tes. Moses Atwood, Rec. p. 142.)

Since 1855, Moses Atwood, the original proprietor has never exercised or claimed any right or interest in the business or property except the right to manufacture and sell in the West, whither he had removed.

(Tes. Atwood, Rec. p. 142; tes. Dodge, Rec. p. 84. qq. 78—85.)

Nobody ever disputed the right of Carter, Dodge & Co., to the Atwood medicine property and business, except that Bateman claimed the right to use the Atwood labels in common with Carter, Dodge & Co., by virtue of some agreement or understanding with Atwood; Bateman never claimed or admitted that the Atwood trademarks, labels etc. had been abandoned to the public, but always recognized Carter, Dodge & Co.'s and their successor's rights (in connection with his own) under Atwood.

The medicine trade generally, always recognized and respected the trademark and proprietory rights of Carter, Dodge & Co. and Bateman to the

Atwood medicines, (Tes. Henry, Rec. pp. 32–37; tes. Sanborn, Rec. p. 39; tes. Sole, rec. p. 42; tes. Hassard, Rec. pp. 47, 48; tes. Carter, Rec. p. 80, q. 180; tes. Dodge, Rec. p. 101, q, 86; tes. Johnson, Rec. p. 16; tes. Howe, Rec. p. 129.)

Is not the fact of the uninterrupted possession and enjoyment of the Atwood medicine business, property and rights by Carter, Dodge & Co., and Bateman, under Moses Atwood, the acknowledged original proprietor, and with his knowledge and consent for more than twenty years, sufficient presumptive evidence of title, so far as Atwood could give them the title, to the medicines and business in question, especially, as against the defendants, who never claimed any rights under Moses Atwood? The court below seems to have entirely overlooked this important fact in passing upon the question of the title of Carter, Dodge & Co., as derived from Moses Atwood.

3.—The title of Carter, Dodge & Co., from Moses Atwood is further proved;

1.—By the testimony of Moses Atwood himself.

(Rec. p. 142.)

Atwood testified, in substance and effect, that in 1855 he sold to Carter, Dodge & Co. all his right, interest and claim to his invention in the said Atwood's Vegetable Physical Jaundice Bitters, with the right to manufacture and sell, and use his name in any way to assist them in the lawful use of the bitters, as they might see proper, for their own benefit and use on all the territory east and south of the States of Illinois and Wisconsin, and that in 1852, for a valuable consideration paid him by Carter, Dodge & Co. he gave them the original recipe for said bitters, etc.

(Rec. pp. 142, 143.)

2.—By the testimony of Luther F. Carter, who testifies, (rec. p. 55,) that Moses Atwood in 1855, when he retired from the business, sold to Carter & Dodge, all his right, title and interest in said medicine business reserving the right to manufacture and sell in the West if he chose; (p. 67,) that Atwood gave to Carter & Dodge the right to manufacture the medicine; (p. 69,) that he supposed Carter & Dodge, at their dissolution, owned the entire right to the bottle with the lettering blown in the glass, and the label as now claimed by the plaintiff; that they owned all the right in Atwood's bitters to manufacture and sell them, except what Atwood reserved; (p. 77.,) that the paper, (conveyance, Moses Atwood to Carter, Dodge & Co.,) "gave them all the rights and privileges in the business to manufacture and sell the medicine and to use the Moses Atwood's name, and there was a power of attorney from Moses Atwood to them. By the medicine, I mean the Atwood medicines. There were different kinds, *to wit:* Atwood's Vegetable Physical Jaundice Bitters, Atwood's Dysentery Drops, Atwood's Canker Drops, Atwood's Liniment, Atwood's Strengthening Plaster."

Benjamin S. Dodge testifies, (rec. p. 85,) that the paper gave Carter, Dodge & Co., all his, (Atwood's,) right, title and interest in the business of said Atwood's medicine; that he thought it specified the several kinds of Atwood's medicines; that it included their right to use Moses Atwood's name and label on the bitters; (p. 95.,) (elicited by the defendant's counsel on cross-examination,) that Carter, Dodge & Co., paid Atwood between $4,000 and $5,000 for the recipes, most of it down, the rest a short time afterwards; that they bought every thing he, (Atwood), had, and supposed they stepped into his shoes; that the right to use his name was mentioned; that they talked about his trademarks,

and his name. The same witness, without objection on the part of the defendants, testifies, (p. 100,) that the Carter and Dodge purchase from Moses Atwood embraced all his stock, materials for manufacturing medicines, and accounts; the whole of his medicine busines; also all of Moses Atwood's trademark rights in respect to his medicine business; that Moses Atwood delivered to Carter & Dodge, in pursuance of the sale, all of his accounts, receipts, medicines left with dealers on commission and all of his stock and materials; and, (under objection of defendant's counsel,) that such stock and materials included Moses Atwood's labels, bottle mould and unfilled bottles; that Atwood conveyed to Carter & Dodge, all his right, title and interest in all of said Atwood's medicines of the several different kinds and the business thereof and his rights therein.

SECOND POINT.

The court below erred in its 4th finding of fact, that evidence was not sufficient to admit parol testimony of the instrument of conveyance from Moses Atwood, to Carter, Dodge & Co.

I.—Because, the loss of such instrument was sufficiently proved.

Luther F. Carter, (rec. p. 77.) testifies that he had not seen the paper since about the time Carter, Dodge & Co. brought the suit against Bateman; (this was about 19 years previous, the Bateman suit having been brought about 1857, ans. rec. p.

10; Bateman Circular, rec. p. 61, and the witness having testified March 26, 1876.);

"142. Have you made a search for said paper; "and if so, how and where?

"Ans. I have made diligent search among my "father's old papers, in the winter of 1874-5.

"143. Have you made inquiries for it?"

"Ans. I have.

"144. Have you made a careful and diligent "search for the paper where it might be expected to "be found?

"Ans. I have.

"145. And have you after such careful and "diligent search been unable to find such paper or "get information of its whereabouts?

"Ans. I have

The same witness testifies, (rec. p. 78,) that he obtained Moses Atwood's affidavit, (the same appearing at p. 142,) by reason of some papers having been lost or mislaid, to show that he had a clear title from Mr. Atwood, and that he recognized it as such.

This witness, Luther F. Carter, was the executor of his father, Moses Carter, (the Carter of Carter, Dodge & Co.,) and had charge of his father's papers (rec. p. 64;) he was also the successor of his father's medicine business.

The court below says in its 6th finding of fact, that "no search was made among the papers of Mr. Dodge," Mr. Dodge, (p. 85,) testifies that the last he knew of the paper Moses Carter had it, about the time it was made out, and that he had not known anything of it since.

The court evidently overlooked Mr. Dodge's testimony.

The court also says; For aught that appears to "the contrary, it may be among his," (Dodge's) "papers, or in the hands of the attorneys in that

(Bateman) suit or in the files of the clerk's office."

It is replied to these suggestions, first, that it could not have been among Dodge's papers because Dodge last saw it in Carters hand's about the time it was made out, (1855,) and had not known anything of it since; second, there was no testimony or suggestion on the part of anybody that the paper was ever left in the hands of the attorneys in the Bateman suit or upon the files of the court. There being no such testimony or suggestion, there could be no presumption that the paper was in the hands of the attorneys in the Bateman suit or upon the files of the court. The court might with just as much propriety have suggested that for aught it appeared to the contrary the paper might be found in a hundred other places. Third, the witness, the executor of his father and custodian of his papers and his successor in business, not only made a careful and diligent search for the paper among his father's papers, (where it was last known to be and where it might be supposed to be found,) but also made a careful and diligent search and enquiries for it, where ever else it might be expected to be found.

The paper was traced to the possession of Moses Carter; it was last seen among his papers: search was there made; Dodge did not have the paper; he had last seen it in Moses Carter's possesion more than 20 years previously and had known nothing of it since; search and enquiries were also made for the paper elsewhere, where ever it might be expected to be found.

What more could be reasonably required to admit parol evidence of its contents?

2.—The court erred in excluding such parol evidence, because, the defendants themselves first

introduced parol evidence of the purport, effect and contents of the paper.

The witness, Carter, on his cross-examination by defendant's counsel was interrogated as to the purport, effect and contents of the paper.

(Rec. pp. 66, 67.)

This was the first parol testimony offered as to the contents of the paper.

The defendants having first introduced such testimony, the appellant had the right to follow up this line of enquiry.

Moreover, the defendant's counsel also, before any parol testimony as to the contents of the paper was offered by the appellant, and after he had been informed of the paper, interrogated the witness as to the interest of Carter & Dodge at the time of their dissolution, in the medicine, label, bottle etc. (Rec. p. 69,) as follows;

"59. What interest did Carter & Dodge own in "the right to the medicine and to the use of the "label and bottle as now claimed by plaintiff at the "time of their dissolution?

"Ans. I suppose they owned the entire right to "the bottle with the lettering blown in the glass and "label, I don't mean that they claimed the fluted "bottle without the letters blown in it.

"60. Do you know what right they owned at "the time of their dissolution, of your own knowl- "edge, except as shown by said paper of January, "1, 1848, to your father?

"Ans. They owned all the right in Atwood's "Bitters, to manufacture and sell them, except what "Mr. Atwood reserved.

The defendants' counsel followed up his enquiry, as to the contents of said paper, as shown in the Rec. p. 72.

"102. What parts of the United States did "Moses Atwood reserve to himself, and what does "he now hold under said reservation?

"Ans. He reserved the right to manufacture and "sell, I think, west of Illinois; I don't know what "he now holds."

Again, the witness Dodge, testified without objection, that the purchase by Carter, Dodge & Co.'s from Atwood in 1855, embraced all his stock and materials for manufacturing medicine and accounts, the whole of his medicine business, and trademark rights in respect to his medicine business, and that Atwood, in pursuance of such sale, delivered to them all his accounts, receipts, medicines left with dealers on commission, and all his stock and materials.

(Rec. p. 100.)

The title of Carter, Dodge & Co. to the trademark rights in question, as derived from Moses Atwood is proved;

1.—By the fact of twenty years of open uninterrupted, undisputed possession, use and enjoyment by Carter, Dodge & Co. and their successors, (a fact fully proved and not controverted.)

2.—By the testimony of Moses Atwood himself, that in 1855, he sold and transferred to Carter, Dodge & Co. all his medicine business, with the right to use his name therewith, etc. on the territory east and south of Illinois and Wisconsin; (this testimony was admitted, not only without objection, but by consent of parties.)

3.—By the testimony of Luther F. Carter, showing the transfer by Atwood, to Carter, Dodge & Co. (Contents of written transfer first proved by defendants; loss of written transfer fully proved and contents shown.)

4.—By the testimony of Benjamin Dodge; (terms of written transfer, proved without objection.)

THIRD POINT.

The court erred in finding as it did in its first, and as it assumed in its fifth, sixth and seventh findings of fact, that Moses Atwood's brother acquired an interest in his business, that is, if the court meant to find that Atwood's brother acquired an interest in the trademarks in question.

There is no evidence in the case, on which to base such a finding, but the evidence shows to the contrary.

Let us examine the evidence on this point.

1.—Moses Atwood testifies, (p. 142,) that he sold his father, Levi Atwood and his son, (brother to Moses,) Levi F. Atwood, the right, to manufacture the said bitters, in a part of New Hampshire, and Maine, and to use their own name on their labels, that is, they were to manufacture and sell their own article under their own name, using therewith their own labels. Moses Atwood sold or gave them nothing but his secret or recipe for making the bitters; he gave them no interest in his business, certainly none in the right to use his trademarks. The father and brother got from Moses Atwood his recipe—nothing more. Having the recipe of an unpatented article, they had the right to manufacture and sell it in their own names in Maine, or wherever else they chose, as long as they did not use anybody's else trademarks. That they were

not to use Moses Atwood's trademarks, is shown by the fact that Moses Atwood made it an express condition of giving them the recipe that they should manufacture and sell in their own name, with their own labels.

It was his trademark rights that Moses Atwood did not sell to anybody except Carter, Dodge & Co.

That it was merely the recipe for making the bitters that Levi F. Atwood, the brother, got, is shown by his affidavit introduced by the appellees.

He says, (p. 219,) "I got a recipe from my brother "and sold to H. H. Hay, Portland, and improved "recipe of my own. I made some additions to the "recipe, and sold to H. H. Hay this recipe of my "own."

Levi F. Atwood agreed with Carter & Dodge, Feby. 22, 1854, (Rec. p. 140,) "Not to reveal or com- "municate in any way, to any person or persons the "knowledge I have of the manner of manufacturing "Moses Atwood's Vegetable Physical Jaundice Bit- "ters, Dysentery Drops, Canker Drops, Rheumatic "or Spinal Elixir, Compound Extract of Sarsaparilla, "and Comfrey.

Neither Levi, nor Levi F. Atwood, nor any one under them, ever used or claimed the right to use the Moses Atwood trademarks.

They designated and distinguished their article by their own names.

(Tes. Carter, p. 80, q. 184, tes. deft. J. F. Wood, p. 148, q. 28.)

The court was probably led into this error by its error in considering the 1848 and 1852 contracts between Atwood and Carter, and Carter & Dodge, as the evidence of Carter, Dodge & Co.'s title.

FOURTH POINT.

The court erred in finding, as in did in its 5th finding of fact, that Moses Atwood never conveyed to Carter, Dodge & Co. the right to put up and sell in the places reserved, etc.

By the places reserved, the court refers to the places reserved by the above mentioned Carter & Dodge license, or contract of September 29, 1852.

(4th and 9th finding of fact.)

As above shown, the court errs in assuming that Carter, Dodge & Co.'s title rested upon that contract, instead of upon the 1855 conveyance; this important error runs through, and vitiates nearly all of its findings of fact.

That this was an error on the part of the court, has already been shown.

FIFTH POINT.

The court erred in finding, in its 6th finding of fact, that if it, (the instrument of conveyance,) is admitted, it has no tendency to show that the conveyance included Maine, or any other of the excepted places.

This instrument of conveyance, (Moses Carter, to Carter, Dodge & Co.) conveyed to the latter, all the former's medicine business, stock and materials, embracing bottles, labels, name, trademarks, etc.

reserving only the right as to the West; it did not except or reserve, any part of Maine or New Hampshire, as already shown.

(See also tes. pp. 142, 77, 72, 85.)

In this 1855 conveyance, there were none of the reservations, or exceptions as to places named in the 1852 contract, erroneously referred to by the court below as the evidence of Carter, Dodge & Co.'s title, from Moses Atwood; the only reservation in the 1855 transfer, was as to Illinois, etc.

(Supra.)

The court, (6th finding of fact,) says;

"Suggestions were made in argument that Moses "Atwood, in the year, 1855, conveyed to Carter & "Dodge, or Carter, Dodge & Co. his entire interest "in the business, except his right to sell the medi- "cine beyond Illinois.

"What a party does not own, of course he cannot "sell, and that is a sufficient answer to proposition, "so far as respects the interests which had become "vested in others," etc.

Now what interests did Moses Atwood own therein when he conveyed all his business, stock, materials, trademarks, etc. to Carter, Dodge & Co., and what interests had become vested in others?

Where is the evidence that Atwood did not then own his entire medicine business, and every interest therein, subject to his previous contract with Carter & Dodge, and subject to any interest Bateman might possibly have? There is none in the whole record.

The right given to his father and brother to manufacture and sell in Maine and New Hampshire, *under their own name, and labels*, was no interest in them, in his business, or trademarks, or property. They, the father and brother, never

had, or claimed any interest in the business, trade-marks, or property.

Nobody else ever claimed any interest, except Bateman, and the appellant acquired the Bateman interest, whatever it was.

The court was in error in finding that; "Localities almost without number, were excepted out of the grant." The court here, as elsewhere, refers to the 1852 Atwood and Carter & Dodge contract, as the evidence of Carter, Dodge & Co.'s title from Atwood: the court confounds this contract, with the 1855 conveyance of Atwood's entire business, to Carter, Dodge & Co.

SIXTH POINT.

Errors of court, respecting sale of Messrs. Atwood's recipe, by Moses F. Atwood, to Nathan Wood.

The court finds that Moses F. Atwood sold the genuine Moses Atwood recipe, to the defendant Nathan Wood; (9th finding of fact.)

1.—Now whatever sale Moses F. Atwood made of any recipe to Nathan Wood, was in writing.

Moses F. Atwood in his deposition taken by the appellees, testifies on his direct examination;

(Rec. p. 203.)

"7. If you ever sold to any one, the receipt to "compound and put up said bitters, state who it "was, when it was, and what your age was at the "time of such sale, and whether you sold it to "Nathan Wood.

"Ans. I did sell a recipe to Nathan Wood in the "year A. D. 1861, I was then 22 years of age, and "conveyed to him the right to manufacture said "bitters in the state of Maine.

On his cross-ex,–(p. 204,) this witness says:

"3. If you made any sale to Wood, as interro- "gated in the seventh direct question, state whether "the sale was in writing; that is, was there any "writing between you and Wood, or from you to "Wood, in respect to such sale. And if you "should say there was any such writing, state where "it is.

"Ans. There was a writing from me to Wood, I "don't know where it is. The writing was in du- "plicate, that is, each had a copy. I lost mine and "don't know where his is."

Nathan Wood testified to the existence of such writings, and that they were among his papers stowed away somewhere, (Rec. p. 180.) No search was made for the writing: there was no attempt to prove its loss; still parol evidence was admitted against the objection of the appellant to prove the sale.

This was directly contrary to the ruling of the Court in excluding parol evidence of the sale from Moses Atwood to Carter, Dodge & Co., when it was proved that a careful, diligent search for the writing had been made among Moses Carter's papers (where it belonged, and where it was last known to be,) and everywhere else where it might be expected to be found.

One ruling, if not both, certainly must be wrong.

2. The Court says that "the proofs are full and to the point that it was the genuine recipe which he," (Moses F. Atwood,) "sold to the respondent, Nathan Wood."

Of the correctness of this proposition there is much doubt.

The only evidence in the case as to Moses F.

Atwood's knowledge of his father's recipe, comes from Moses F. Atwood, himself.

In his deposition, (p. 203), he says:

"5. State whether you became acquainted with "the manner of preparing and compounding said "article, and from whom did you so become ac- "quainted? "Ans. I did become acquainted with "the medicine when I worked for L. H. Bateman, "and the manner of preparing and compounding it. "I became so acquainted with said article and the "manner of manufacturing and compounding from "L. H. Bateman."

Counsel did not ask him and he did not say he knew the Bateman recipe.

Now, is it likely that Bateman would entrust the secret of his medicine to his hired man, who had no interest in the business, a hired day laborer, who might greatly injure his business by disclosing its secret, the most important thing in it?

Moses Atwood testifies that he never gave the recipe to anybody except Carter & Dodge, and his father and brother, etc. (Rec. p. 143.)

The conduct of Moses F. Atwood does not entitle the testimony to much credit.

Assuming for the purpose of the argument that he sold Bateman's receipt to Wood, what position does that place him in?

He fraudulently sold the secret recipe of his employer, which he learned while in his employ in putting up the Bitters when good faith and honesty toward him required that he should keep the secrets of his employer's business learned in the course of his employment, and his selling them was a gross fraud upon Bateman.

There is no pretense that he ever had any interest in the business of putting up the Bitters.

He says himself that he never put up the Bitters on his own account;

(Rec. p. 203, q. 6; p. 204, q. 304.)

There is no evidence or suggestion even, that Bateman ever gave him the right to sell to Wood the secret of his business; every presumption is to the contrary.

It may be that he cheated Wood by making up a fictitious receipt for him; this would be as consistant with his honesty as to assume that he cheated Bateman by selling his receipt. He does not say that he knew the Bateman recipe. If he did not know it, of course, he could not sell it, and Wood did not get it.

Then again to assume that Wood got from Moses F. Atwood, his father's genuine receipt, is to assume that the Bateman receipt was identical with the genuine Moses Atwood receipt.

But whether Moses F. Atwood did, or did not communicate to Wood the correct recipe, Wood acquired no right to the trademark rights of the article, that is, the name, particular style of bottle and label used by Moses Atwood and his successors.

The right to manufacture an unpatened article is entirely separate and distinct from the right to use the trademarks of another manufacture of the same article.

Anyone who understands the art, may manufacture the article, but only the owner of the trademarks, has the right to use them.

SEVENTH POINT.

It was error for the court, to find that Wood supposed he had acquired the right to use the labels by his purchase of the recipe from Moses F. Atwood.

(In 9th finding of fact.)

How could Wood suppose he acquired the right to use the labels?

He must have known that Moses F. Atwood had no right to the labels. The label was the trademark right of the manufacturers, the successors of Moses Atwood.

1.—In 1861, when Wood claims to have got the recipe, the article was an old well known one in trade; it had then been upon the market for twenty-one years, extensively sold throughout the country by Moses Atwood and Carter & Dodge, up to 1855, by Carter, Dodge & Co. from 1855, up to about 1858, and thereafter, by Carter, Dodge & Co.'s successors.

Wood was a druggist and medicine dealer. How could he have helped knowing this fact?

2.—The evidence shows that Wood did know when he got the recipe, that the Atwood Bitters were being manufactured at Georgetown, by the Carters and Bateman.

Wood in his testimony, April 22, 1876, says;

"73. For how many years to your knowledge, "have the Mystic parties, Bateman and the Carters, "been manufacturing, and selling their bitters in "the market?

"Ans. Fifteen years and over, except the Mys-"tic: I have heard nothing about the Mystic "manufacturing until within a year."

3.—Wood did not buy of Moses F. Atwood, his father's, (Moses Atwood,) labels. He bought only

the recipe, and the right to manufacture and sell them in his, Moses F. Atwood's name. Moses F. Atwood in his affidavit, put in evidence by the appellees, says, (Rec. p. 217;)

"That he is a resident of the Town of Union, "Hardin County, in the State of Iowa; that I was "born in the State of New Hampshire, in the town "of Hampstead, on the 28th day of March, A. D., "1839, that I am the son of Moses Atwood, and that "my father is sixty-six years old; that I worked for "my father assisting him to put up Atwood's Veg-"etable Physical Bitters, and other work, until I was "sixteen years old, when my father moved to New "Sharon, inthe State of Iowa, in the year A. D., 1855, "where he now resides, at which place I went with "him. About January, A. D., 1860, I moved back to "Georgetown, Massachusetts, where I had formerly "resided, and commenced work for a person named "L. H. Bateman, who was engaged in the manufac-"ture of the aforesaid bitters, and so continued in his "employ, assisting him in the manufacture of the "aforesaid bitters, until the year, A. D. 1861, when "I moved back to this State, where I now reside; "and that my father used the twelve square or fluted "bottles, said bottles being used by my father in "putting up the aforesaid described bitters; also L. "H. Bateman, to my personal knowledge, used the "aforesaid described bottles, in putting up said "bitters. In *the year A. D.*, 1861, *when I was "about twenty-two years of age, and before mov-"ing to the State of Iowa, I sold and conveyed "unto one Nathan Wood, of Portland, Maine, a "right to manufacture and sell* IN MY NAME, *"Atwood's Physical Jaundice Bitters, in the State "of Maine, and elsewhere, as per receipt dated.*" (Italic is mine.)

This affidavit clearly shows that Moses F. Atwood had no interest in the business of the Bit-

ters, and did not sell, or undertake to sell to Wood anything but the recipe and right to manufacture and sell in his name.

The testimony of Nathan Wood as to the purchase of the recipe, (pp. 172–3,) is that he bought the recipe of Moses F. Atwood, May, 1861; that he first heard of him through his traveling agent; that he was traveling in this State, (Maine), settling up, as he represented to Wood's agent, bills for Atwood's Bitters left on commission; that he, (Wood), first learned that he, Moses F., was willing to sell the recipe by his asking his, (Wood's,) agent if he knew any one that wanted to buy a recipe for making Atwood's Bitters; that he, (Wood's agent,) told him he thought I, (Wood,) would buy it; that he soon thereafter purchased the recipe of him; that he received a letter from him enclosing the recipe; that a label,(such as label on "Exhibit A, July 14, 1875,") was sent by him to be used with the article compounded according to the recipe, and that he referred him to the smooth twelve square bottle, *i. e.*, without any lettering. He called it the eight ounce prescription bottle, known to the trade as an eight ounce fluted prescription bottle.

On cross-examination.(p. 180, qq. 119–121,) Wood says that he has writings beside the letter from Moses F. Atwood, in respect to the bitters; that they are among his papers; that, (p. 181, qq. 132–143), he did not know the history of the article at all when he bought the recipe; that he did not then believe Moses Atwood was the first inventor and compounder; that he didn't know anything about it; that when he bought the prescription, he didn't know anything about it; he bought it because he had calls for the article in his trade; that he declines to answer what he paid for the prescription; that he so declines on the ground that he didn't wish to disclose his trades and bargains; that he took a

receipt from Moses F. Atwood on account of the prescription; that the receipt is amongst his papers somewhere; that he will produce it if he can find it; that he has not seen it since the suit was commenced; that he does not remember how the receipt reads; (p. 182,) that he has not searched for the paper since this suit was commenced; that he can not say how many times he had seen Moses F. before he bought the recipe; thinks he had seen him twice; concludes he had bought the prescription when he received the letter (L;) thinks he had not paid for it then; thinks he paid him in cash; that he probably sent it by express; that he declines to say how much he sent, on the ground that he does not wish to disclose the price he paid for the recipe; that he does not recollect when he bought the prescription of Moses F. that he told him he was the son of Moses Atwood, whose name appeared on the bottle and labels; that he was not then informed that Moses F. had worked for his father, or Bateman, in putting up the bitters; (p. 183,) that he said his father gave him the recipe; that he never had any communication with Moses Atwood in respect to the bitters; that he took Moses F.'s word that his father invented it, (bitters;) that he didn't know at the time who his father was; (p. 184.) that he did not try to find out Moses Atwood; that he did not write to any one except Moses F. Atwood, or try to ascertain from any one of the parties putting up Atwood's Bitters, whether he had got the genuine recipe. (P. 184, Wood testifies;)

"192. You say Moses F. Atwood, referred you "to a fluted bottle and label, in what way did he "refer you to them?

"Ans. He sent me a label in a letter, and re- "ferred me to a fluted, or eight ounce bottle with- "out any lettering.

"193. In what letter did he send the label to you?

"Is it the letter attached to your affidavit, marked "Exhibit L. and dated, May 28?

"Ans. I had four or five letters from him. I "couldn't state in what letter; it was sent while he "was at Georgetown.

"194. Have you got any of these letters except "Exhibit L?

"Ans. I have not.

"195. When did you look for them?

"Ans. When I moved from Deering Block to "Commercial Street, these letters hung on a hook "over my desk. Some one took them. This one was "in my safe, and was preserved with the recipe."

Here we have all the evidence in the case respecting the purchase by Nathan Wood of the recipe. He purchased the recipe of a stranger, a young man, only 22 years old, at a price which he is ashamed, and refuses to tell, upon his mere representation that his father gave him the recipe, without knowing or enquiring who his father was, without trying to find out whether it was the genuine recipe, or whether the young man had any interest in the business or any right to sell the recipe,—the recipe of an old established article in the trade, and for which he says he had calls in his trade.

How could Nathan Wood suppose he had purchased the label of Moses Atwood, when the young man sold him only the receipt, with the right to manufacture and sell in his name, as he himself testifies and proves by the testimony of the young man?

The label bore the name of Moses Atwood, Georgetown, Mass., as the proprietor and manufacturer.

Did he suppose that he was succeeding to an important business, to valuable trademark rights, worth many thousands of dollars, by the mere pur-

chase of a recipe from a strange young man—for an insignificant sum?

It is not pretended by Nathan Wood that he bought anything but the recipe with the right to manufacture and sell in the name of Moses F., nor that Moses F. represented that he had any interest in the Moses Atwood business, or in the label or other trademark rights, only that Moses F. sent him the label and referred him to an eight ounce fluted prescription bottle without any lettering as the one to be used.

Nathan Wood, as an intelligent man and experienced medicine dealer, well knew that the Moses Atwood label was the great distinguishing mark of the Moses Atwood's Bitters, which he and other druggists and medicine dealers throughout the country were then and for more than twenty years previous had been selling over their counters.

He knew the Moses Atwood Bitters were manufactured at Georgetown, Mass;, because, the label so informed him. He had only to write to Georgetown to find out all about the business; he does not write nor make any inquiry, but proceeds to manufacture and sell an article of Bitters according to his purchased recipe as he says, using two different styles of labels and bottles, one almost a perfect *fac-simile* of the Moses Atwood bottle and label and which he says he sold very little of, and another with a different style of bottle and label.

How could Nathan Wood, under these circumstances, have supposed he had a right to the Atwood Label?

EIGHTH POINT.

The appellees never acquired any right to the trademarks in question, viz. the name of Atwood's Vegetable Physical Jaundice Bitters, the lettered bottle and the Moses Atwood label.

1—Because, as already shown, they never purchased of young Atwood anything but a recipe and the right to use his name therewith.

2.—Because young Atwood never owned nor had any right to sell any of the trademark rights in question. He never had or claimed any interest in the business. In his deposition, (Rec. p 203, q. 6, R. 204, q. 2), he says he never put up nor sold said Bitters on his own account.

The only connection he ever had with said Bitters was as a boy to work with his father, assisting in putting them up, until he was 16 years old, then to work for Bateman for a while as hired man by the day. He never claimed any interest in the business.

His depo. (pp. 203, 204; his aff. p. 217; tes of Carter, pp. 58, 59; tes. Dodge, pp. 93, 95; tes. Dorman, p. 107.)

Of course young Atwood could not sell what he did not have to sell.

He says in his dep. (p. 204,) that he sold Wood the recipe and the right to manufacture and sell in the State of Maine and elsewhere. To manufacture and sell how? "To manufacture and sell in my name," (his aff. p. 217.) "The receipt for the money paid for the recipe and rights to manufacture and sell in his name;" (Nathan Wood, p. 186, ans. q. 217.)

NINTH POINT.

The court was in error in finding that one of appellant's grantors, Carter, put up and sold an imitation Bitters.

The article referred to was not an imitation, but the genuine Atwood's Bitters, reduced in strength by the addition of a little larger proportion of water.

The full strength Bitters contained a certain proportion of water, and the reduced Bitters a little more.

The reduced article contained precisely the same medicinal ingredients, and produced precisely the same medicinal effect, by increasing the dose or quantity taken.

They were put up in this reduced form to meet the demands of the trade which called for a cheaper form of the article.

There was no deception or attempt at deception. The article sold for what it actually was, viz. Atwood's Bitters reduced in strength. The price was reduced more than the strength.

Carter testifies, (p. 70, q. 79,) that the two kinds of bitters were compounded and made in the same way, but not of the same strength; (q. 81,) that the materials of the reduced kind was as good in every respect; (p. 73, qq. 113, 114,) that the price of the full strength was $27, that of the reduced $15 to $16 per gross; (p. 74, qq. 131—6,) that the ingredients were the same, only one was diluted by a larger proportion of water; that the standard was unvarying; there was more than half the medicinal matter in the $16 kind; that the price was not in proportion to the cost, the $16 kind costing nearly as

much for materials as the others; that he saved one cent for stamp on each bottle. (See also p. 76, qq. 134–8.)

There is no evidence in the case that there was any deception of the public; the reduced Bitters made by Carter, were sold only at wholesale; the retailer having purchased the reduced Bitters at a reduced cost, sold, it is presumed, to the consumer, at a correspondingly reduced price.

TENTH POINT.

The court below entirely overlooked the important fact that Carter & Dodge first devised and adopted the bottle marks, viz.: the lettering on the bottle in question.

The bottle used by Moses Atwood was the round, smooth bottle, as stated by the court; (Bottle Ex. F.)

Dodge testifies, (p. 90, q. 44,) that he and Carter first adopted the fluted bottle; (p. 102, q. 103,) that Carter & Dodge used the same labels and names as Atwood, only they changed from the round to the fluted bottles; (p. 94, qq. 8 and 9,) that they, (C. & D.,) changed to the fluted bottle about three years after they began business, and then discontinued the use of Bottle F, (the Atwood smooth round bottle;) (p. 85, qq. 41-43,) that Carter & Dodge adopted bottle A, (the fluted bottle in question,) about 1855; (p. 88, qq. 44 and 45,) that Carter & Dodge procured the mould to be made for Ex. A, and thereafter used that kind of bottle and label.

(The label on Exhibit A. is the same as on Exhibit F. the Atwood bottle.)

The letters blown in the glass of bottle Exhibit A, (the Carter & Dodge and appellant's bottle,) are, "Atwood's Jaundice Bitters, Moses Atwood, Georgetown, Mass.;" the letters blown in the glass of the defendant's bottle, are "Atwood's Genuine Physical Jaundice Bitters, Georgetown, Mass."

The appellee's bottle, in respect to shape, size, marks, and appearance, is an apparent imitation of the appellant's bottle, and must have been so intended.

Carter, Dodge & Co. themselves, originated and adopted these bottle marks, and thereby acquired them as their own trade mark property; they did not acquire them from Moses Atwood, as they did the label, etc. but by their own adoption and user?

Now, it is not denied that the appellant has acquired all of the trademark rights of Carter & Dodge, only it is claimed that it is not sufficiently proved that Carter & Dodge ever acquired the trademark rights of Atwood.

If the bottle trademarks were originated by Carter & Dodge, and thereby became their own property, then the same passed to the appellant unaffected by any question of transfer from Atwood to Carter & Dodge.

These bottle marks are an important part of the trademarks claimed by the appellant. The appellees have imitated these, as well as the trademarks originated by Atwood.

The appellant is, in any view of the case, entitled to protection against the imitation of these bottle marks—provided they are good trademarks, and provided they have not been lost by forfeiture.

That they are good trademarks, and have not been lost by forfeiture, will, I believe, clearly appear.

ELEVENTH POINT.

It is respectfully submitted that the Court below erred in its several findings of law.

The Court in its opinion stated its first and second conclusions of law as follows;

"1. Examined in the light of the findings, as the "case must be, it is clear to a demonstration that "the complainants have no exclusive right to put "up and sell the medicine, nor any exclusive right "to the labels, which belonged to the original pro- "prietor."

"2. That all they claim in respect either to the "medicine or the labels, is the right to the same "which was held by Carter & Dodge, who never "possessed the right to put up the medicine, or to "use the labels in any part of Maine, except the "three towns named in the said written agreement."

The Court bases these conclusions of law upon its previous findings of fact.

If the court was mistaken in its facts then its conclusions of law are erroneous.

That the court was mistaken as to the derivation of the appellant's title to the labels etc., of the originnal proprietor has already hereinbefore been shown.

1. It has been shown that the court mistakenly assumed that the appellant derived its title from Carter & Dodge, by virtue of the Sept., 29, 1852, license agreement between Atwood and Carter & Dodge, when, in fact, the appellant derived its title from Carter, Dodge & Co., by virtue of Atwood's

transfer to them in 1855, of all his medicine business, stock, bottles, labels, trademarks etc. It has been shown that the fact of this 1852 transfer to Carter, Dodge & Co., was proved by the testimony of Atwood himself as well as other witnesses. It has been explained that this 1852 license contract which the court erroneously took as the evidence of the title of Carter, Dodge & Co. was put in evidence to show the origin and user of the labels etc. and not for the purpose of showing the transfer of title from Atwood.

2. It has also been shown that the court by mistakenly taking the 1852 contract as the basis of the appellant's title, held the appellant bound by the various exceptions and reservations contained in that contract, whereas that contract was superseded by the 1855 transfer.

3. Also that the court mistakenly assumed that Moses Atwood conveyed to his father and brother the exclusive right to use his labels in the State of Maine and New Hampshire, whereas in fact, Moses Atwood never conveyed to his father or brother the right to use his labels in Maine, New Hampshire or elsewhere, but merely gave them his recipe to use in those States with their own names and labels.

4. Also, that the court failed to consider that Carter, Dodge & Co. and successors had made the labels etc. their own by appropriation and user for period of 20 years to mark and give currency to their own goods.

5. Also that the court overlooked the fact that Carter, Dodge & Co. originated and adopted the bottle marks (an important part of the trademarks in contention) and did not derive the same from Moses Atwood.

If the court was mistaken as to these essential facts then, of course, its conclusions of law must fall.

That the court was so mistaken there can be no doubt from the evidence.

TWELFTH POINT.

It is respectfully submitted that the court erred in its third finding of law; "That the rights of cer- "tain of the assignors of the complainants, if any "they ever had, were forfeited long before the sup- "posed tranfer under which the complainant's "claims, by the use of the trademark as a means of "misrepresentation and deception to the public, by "putting up a spurious article, and using the gen- "uine trademark to promote the sale of the "spurious article."

The court was mistaken as to the article referred to being a spurious article, also, as to misrepresentation and deception of the public.

1.—As to spuriousness.

The bitters referred to by the court as spurious, were the $16 Bitters, sold by Luther F. Carter. Now we have under Point 9 shown that these were not spurious; that they were simply a cheaper form of Atwood's Bitters called for by the trade; that they were composed of precisely the same materials, and put up in precisely the same way with the single exception that they were somewhat reduced in strength; that they were sold to the public for just what they were viz.: Atwood's Bitters reduced in strength, and at a reduced price.

The only ground on which the article could possibly be called a spurious one, was that it was of less strength than the other. Can an article be called spurious because made of less strength than

another? It may be of inferior quality; but does simple inferiority of quality constitute spuriousness? If so, then every article made of the same materials, but inferior in strength, is a spurious one.

2.—As to misrepresentation and deception.

There is no evidence in the case that anybody was ever deceived; or that the reduced Bitters were ever sold for those of full strength; or that there was ever an attempt to do so.

3.—But if the fact that Luther F. Carter, one of the appellant's grantors, at one time, a number of years ago, used the regular Atwood label on a kind of Bitters, reduced somewhat in strength, but in every other respect precisely the same as the regular Atwood Bitters, so put up to meet the demands of the trade, for a cheaper form of Atwood's Bitters, and sold at a cheaper price for what they were, warranted the court in finding as a fact that such form of Bitters, so put up and sold, was a spurious imitation of the genuine, and a misrepresentation and deception. such finding of fact did not warrant the court in coming to the legal conclusion that the genuine Atwood label was thereby forfeited.

The legal proposition of the court is that the use of a genuine label on a spurious article forfeits the the genuine label for all purposes, even for use on the genuine article.

This propisition I respectfully submit, is not sound in law or reason.

None of the authorities cited by the court in its opinion sustain such a proposition.

These cases, and others belonging to the same class, simply decide that the court will not enjoin an alleged infringing article where the alleged infringed article is deceptive and fraudulent. In all these cases the court refused protection to the marks and labels because they essentially misrepresented the character of the article which they covered, and for

which protection was asked. But in none of these cases cited, and in no other case I have been able to find, has any court ever declared forfeited genuine trademarks covering a genuine and honest article, because, at some time or other they have been used on a spurious and deceptive article.

If Luther F. Carter himself had come before the court asking protection for his reduced Bitters, and the court had been satisfied that it was a fraudulent article, it might have refused protection on that ground. But that is far from being this case. Here the appellant's label is the genuine Atwood label and covers the genuine Atwood Bitters. There is no dispute or question as to that. There is no misrepresentation or deception on the part of the appellant's article, nor any pretence of any.

In asking protection for its article the appellant does not ask the court to protect a fraudulent article, but, on the contrary, a genuine honest article covered by a genuine honest label.

The appellant never sold the reduced (so called imitation) bitters; it has never sold anything but the genuine Atwood Bitters. There is no claim that the public has in any way ever been deceived by the appellant's article.

How then does the court protect the public against a fradulent article by refusing protection to a genuine honest one?

4.—Then again, Luther F. Carter was but one of the several owners of the Atwood business, labels, etc. There is no claim that any of his co-owners ever had anything to do with his reduced, (or so called imitation) bitters; that they in any respec- ever misused the trademarks.

Were the trademark rights of these co-owners also forfeited by the act of Carter, with which they had nothing to do?

Must they suffer the loss of a large and valuable business and property without any fault of their own?

Upon this point the court erred.

THIRTEENTH POINT.

It is respectfully submitted that the court erred in its 4th finding of law viz.: "That the assignors of the complainants forfeited all their property, if any, in the trademark belonging to the original proprietor by a disregard among themselves of their several allotted districts after the grant or license from the original proprietor by tresspassing upon each other and misuse of the trademark."

1. As to "trespassing upon each other."

The court by this, I suppose, refers to the arrangement made when Carter, Dodge & Co. dissolved partnership that each member should sell on certain allotted territory.

(Tes. of Carter, p. 56. q. 35.)

This territorial division arrangement was mutually ignored after a few years.

(Same Witness, p. 83, q. 192.)

And mutually acquiesced in by the parties.

(Tes. Mr. Dodge., p. 103, q. 110.)

If the parties had a right to make this territorial allotement they had a right to unmake it by mutual consent, or to abandon it by mutual ac-

quiescence as they did. How could, this affect the trademark rights of the parties?

Each member was to use, and did use the Atwood label on all his goods in what ever territory they were sold.

(Tes. Carter, p. 56, qq. 36, 37, p. 57, q. 50, p. 48, qq. 61, 65, 66.)

2. But if the several members of Carter, Dodge & Co. did trespass upon each other's territory, how could that forfeit their trademark property?

If a man agrees to use his trademark on certain territory, and he uses it on other territory, does that forfeit his trademark?

He might, perhaps, under certain circumstances, be denied protection to his trademark in a place where he had agreed not to use it; or be restrained from so using it, but how it would cause a forfeiture of his trademarks is difficult to conceive.

The court cites no authority and gives no reason for this ruling.

FOURTEENTH POINT.

It is also respectfully submitted that the court erred in its 5th finding of law;

"That the grantees or licensees of the original proprietor, and their successors, forfeited the right to the original trademark of their grantor or licensor by the voluntary relinquishment of the bottle label and directions which he used before the transfer

and by the adoption of new and different labels etc. of their own substitution, one or more of whom put up and sold a spurious article of medicine under the genuine label, and used a different label of his own invention on bottles containing the genuine medicine."

This finding contains, I believe, errors, both of fact and law.

1. What is the evidence of the "voluntary relinquishment of the bottle label and directions" of the original proprietor which he used before the transfer by his grantees? What is the evidence of their "adoption of new and different labels etc. of their own substitution," etc. ?

The evidence plainly shows that Carter, Dodge & Co., and all their successors always used the label of the original proprietor, that is, the Moses Atwood label.

Luther F. Carter testifies, that the bottle used by Atwood for his Bitters was a round, smooth, plain eight ounce, no lettering, with a label on it similar to the label on Exhibit A, (appellant's bottle and label;) that the bottle was about the same size and height and a little less in diameter than Ex., "A."

(Rec. p. 54. qq. 19–21.)

That Atwood's round bottle had no marks on it; that the label used on it was similar to the label on Exhibit "A" with, he thinks, precisely the same reading; thinks the label a little narrower and longer and about the same color; that Atwood used the fluted, like Ex. "A" before quitting the business at Georgetown, sometime according to his recollection between 1852 and 1855; that Carter, Dodge & Co. used bottle same as Ex. "A," and same label, (p. 55, qq. 22–24, 34;) that after the dissolution of Carter, Dodge & Co., the medicine was put up the

same way as before, manufactured and sold by M. Carter & Son, and Benjamin S. Dodge (p. 56. q 37;) that Lewis H. Bateman and his son used the same style of bottle and label as Ex. "A;" that Carter & Sons and Carter & Son, used the same labels with a heading, reading "Carter's are the only genuine," and then, that it went on and read the same as Exhibit "A;" that they used the name of Carter on the label to designate their own manufacture from those of Bateman, who was their greatest competitor; that Bateman used his name printed in red ink across the label; that Bateman claimed to have acquired the right to use the same style of bottle and label as the successors of Moses Atwood, by commencing the business and putting up the medicine in connection with Moses Atwood (p. 57, qq. 50, to 54.;) that Dodge used the same style of bottle and label as Exhibit A; that Noyes & Manning used the same style of bottle and label (p. 58, qq. 61, 65, 66;) that the bottle and label thereon marked "Plantiff's Exhibit F., March 29, 1876," is the Atwood bottle and label refered to by him, (p. 62, q. 94;) that Carter & Sons, never used any other kind of bottle than a fluted one substantially like Exhibit C. in form; [Exhibit C. was the same as Exhibit A. in respect to form and style of bottle and label;] that Carter, Dodge & Co. never used any other, that Dodge, Bateman, the Mystic people and himself had used that; that he thought it had been used since 1852 or 3; that it had been adopted by Carter & Dodge, and the smooth round bottle, Exhibit F.,discontinued; that he first saw Exhibit F. as long ago as he could remember, (p. 71. qq. 87, 88, 89, 91, 92, 93, 95;) that it came from the stock of Carter & Dodge, (p. 72, q. 99;) Mr. Dodge having an earlier acquaintance with these matters was able to state some of these facts with more precision.

Mr. Dodge says that Carter & Dodge commenced

to use a smooth bottle such as Exhibit F. which is one of the original bottles and labels; that this bottle and label F. were the bottle and label used by Moses Atwood previous to his transfer to Carter & Dodge; that Carter & Dodge used bottle and label F., he thinks, about three years, that bottle and label A. were used about 1855, by Carter & Dodge, he thinks (p. 85, qq. 39-43;) that Carter & Dodge procured the mould to be made for the bottle Exhibit A; that thereafter Carter & Dodge, and Carter, Dodge & Co. used the bottle and label of which Exhibit A; are *fac similes*, (p. 86, qq. 44–46.)

There is no doubt of the facts, (1) that Moses Atwood used for his bitters the yellow printed label on the smooth round bottle, Exhibit F; (2) that Carter & Dodge, or Carter, Dodge & Co. after the transfer of the business to them, devised and adopted the fluted bottle with the lettering thereon and label such as Exhibit A; (label on Exhibit A, is like label on Exhibit F;) (3) that Carter, Dodge & Co. and Bateman and successors down to, and including the appellant, always used the fluted lettered bottle, and Atwood label without any change, except that the Carters added to the labels used by them, their own names and heading, and Bateman also printed his name across the labels used by him.

These are the facts—undisputed facts, on which the court found that the grantees, or licensees of the original proprietor and their successors, forfeited the right to the original trademark of their grantor or licensor by the voluntary relinquishment of the bottle, label and directions, which he used before the transfer, and by the adoption of new and sufficient labels etc. of their own substitution. There was no "relinquishment" of anything except the smooth round bottle used by Atwood, for the fluted and lettered bottle devised and adopted by Carter, Dodge & Co.

There was no "adoption of new and different labels etc. of their own substitution," except the adding of the Carter's name, etc. to the label used by the Carters, and Bateman's name, to the label used by him.

The Atwood label was always retained and used in its entirety by all of Atwood's successors.

How could the substitution of the Carter, Dodge & Co.'s fluted lettered bottle for the Atwood smooth unmarked bottle, affect the trademark of the original proprietor?

No trademark right to the smooth round bottle was claimed.

Carter, Dodge & Co. did not forfeit their right to the Atwood label by using it on their fluted lettered bottle instead of on the Atwood smooth bottle.

They had a right to add to the Atwood marks other marks of their own, and make all their own.

Sohl v. Geisendorf, 1 Wilson (Ind.) 60.

This follows from the very nature of trademarks. Trademarks are things used to represent a particular article, to designate it, to identify and distinguish it from other articles of the same class.

Upton on Trademarks, 47.

The use of the Atwood label on the fluted bottle with the lettering, "Atwood's Jaundice Bitters, Moses Atwood, Georgetown, Mass." did not serve less to represent, designate, identify and distinguish the Moses Atwood's, than the label with the smooth bottle, but more. The old mark was not destroyed by the addition of the new.

For more than twenty years previous to the transfer of the business to the appellant, these combined marks viz: label and bottle marks, had served to represent, distinguish and give currency to the appellant's article; (tes. Henry, pp. 32, 33;

Sanborn, pp. 38, 39; Sole, p. 42; Hassard, pp. 47, 48.)

The defendants have imitated not only the label, but the bottle marks.

Carter and Bateman did not cause a forfeiture of the label by adding to those used by them their respective names.

Brohum v. Bustard, 1 H. & M. 447; 9 L. I. n. s. 199; 11 W. R. 1061; 2 N. R. 572.

Ford v. Foster L. R. 7 Ch. 616; 27 L. I. n. s. 220; 20 W. R. 311; 41 L. J. Ch. 682; 20 W. R. 818.

It will be observed that the court cites no authority nor gives any reason for its ruling of law on this point.

FIFTEENTH POINT.

The trademarks in question, are good trademarks and entitled to protection.

1.—The name of its medicine, Atwood's Vegetable Physical Jaundice Bitters.

The facts fully proved by the record are; (1) that this name was adopted, many years ago to designate the appellant's medicine – (2) that this name was used by the original proprietor, Atwood, for that purpose; (3) that it was so used by his successors, Carter, Dodge & Co. during the existance of that firm, and also by Bateman; (4) that it was so used by the successors of that firm, viz: Carter's, Dodge, Dorman, Noyes & Manning; (5) that it has always

been so used by the appellant; (6) that said name has always served to designate and distinguish said article of medicine in the market for about 40 years.

2.—Such name is a good trademark name, and as such, entitled to protection.

McLean v. Fleming, 96 U. S. Rep. (6 Otto.) 245;
Kidd v. Johnson 100 U. S. 617;
Hall v. Burrows 4 De G., J & S. 150; 33 L. J. Ch. 204; 10 Jur. N. S. 55;
Fulton v. Sellers, Penn. Sup. Ct. 4 Brews. 42;
Field v. Lewis, Seten 4th ed. 237;

3.—Such trademark name was assignable.

Cases above cited.

4.—The Atwood label was a trademark right entitled to protection.

This label is a prominent feature of the trademarks in question. It has always served in connection with the other marks with which it has been used to distinguish the appellant's article of Bitters.

The original proprietor devised, adopted and used this label for his Bitters. His successors all used this label. The appellant has always used it. It has never been used by the public.

The law will not allow one man to sell his goods as those of another by the use of similar labels.

Cases above cited.
Perry v. Trufitt, 6 Beau. 66;
Craft v. Day, 7 Id. 84;
Taylor v. Carpenter, 11 Paige, 292;
Amoskeag Man'f'g Co. v. Spear, 2 Sanp. S. C. 599;
Coffeen v. Brinton, 5 Mc Lean, 256;
Taylor v. Taylor, 2 Eq. Rep. 290;
Farina v. Silverbach, 2 Jur. n. s. 1008;
Brooklyn White Lead Co. v. Maurry, 25 Barb. 416;
Edelston v Edelston, 9 Jur. n. s. 479;

Boardman v. The Meriden Brit. Co. 35 Conn. 402;
Colman v. Crump, 70 N. Y. 573;
Sawyer v. Horn, C. C. U. S. Dis. Ma.

5.—The appellant is entitled to protection of the marks upon its bottle viz: the lettering in the glass viz: "Atwood's Jaundice Bitters, Moses Atwood, Georgetown, Mass."

These marks as before stated were originated by Carter, Dodge & Co. and used by them, and all their successors ever since as distinguishing and identifying marks of the appellant's article.

6.—All these trademark rights have by assignment and succession come to, and are vested in the appellant.

I believe the record shows an express assignment of the trademarks in regular succession from Atwood to Carter, Dodge & Co., and so on down to the appellant, but such proof is not necessary because a transfer and succession of business of an article carries with it its trademarks by implication.

Shipwright v. Clements, 19 W. R. 599;
The Congress and Empire Spring Co. v. The High Rock Spring Co., 45 N. Y. 291.

SIXTEENTH POINT.

The appellees had infringed the appellant's trademark rights and should have been enjoined.

I. Imitation.

The name, label and style of bottle used by the defendants are imitations of those of the appellant.

The defendant's fluted bottle is almost a perfect *fac-simile* of the appellant's bottle as to size, form, color of, and printed words on the label, and raised lettering in the glass; the differences are so slight as to escape ordinary notice; one cannot be distinguished from the other without careful examination and comparison.

There is a slight difference in glass lettering, the appellant's reading:

"Atwood's Jaundice Bitters, Moses Atwood, Georgetown, Mass."

The defendant's,

"Atwood's Physical Jaundice Bitters, Georgetown, Mass."

The labels contain the same printed matter; there is a slight, hardly noticable, difference in the type and bordering.

That the defendants' article in the fluted bottle shape is liable to be taken for the appellant's article by ordinary purchasers, there can be no question whatever.

It was manifestly got up with intent that it should be sold for the appellant's article.

The slight differences between the imitation and original were cunningly made by Wood, to escape, as he supposed, liability for trademark infringement, otherwise he would have made an exact copy of the original. Wood could have had no other motive in departing so slightly from the original.

2. Then as to the defendant's article in its other shape.

The name and label on defendant's long, round Bitter bottle (plff's Ex. B) are substantially like the plaintiff's name and label.

Compare them; first the name.

The plaintiff's name is "Atwood's Physical Jaundice Bitters"; the name used by the defend-

ant's name is "Atwood's Genuine Physical Jaundice Bitters."

Scarcely anybody would notice the difference unless very well acquainted with the articles, or unless his attention was particularly called to it. The attempt of the defendants to imitate the name of the plaintiff's article is apparent; they add the word "Genuine" to make what they may point out as a difference, or rather, perhaps, indicate that the original is the counterfeit.

After the name, the defendant's label proceeds the same as the plaintiff's to the word "effectual" in the plaintiff's, which is changed to "effective" in the defendants'; and then the same to the words "darting pains, colds and fevers," which are transposed in the defendant's to read "colds and fevers, and darting pains;" then the same to the words, "It is also good," changed to "and is also good;" then the same to "it should be taken," changed to "to be taken;" then the same to "for fevers," where a single sentence is interpolated; then the same to "it should be taken," changed to "to be taken," then the same to "then continue," changed to "and continue;" then proceeds the same to "for liver complaint," changed to "in liver complaints;" then the same to "it should be taken," changed to "to be taken;" then to the words, "at the same time," left out; then the same to the end of the directions.

Then, after Nathan Wood's name and address follows a false statement to the public that he, Nathan Wood, had "purchased of Dr. Atwood his entire right and interest, &c.," and that Dr. Atwood had delivered to him the original and genuine receipe for making the medicine, &c.

By "Dr. Atwood," the original proprietor, Moses Atwood was, of course, intended to be understood;

the public would, as a matter of course, so understand it.

3. The defendants intended to deceive and defraud;—to deceive the public into purchasing his article for the plaintiff's, and thereby defraud the plaintiff of its profit.

This fraudulent intention is apparent:

1st.—From the defendant's close imitation of the plaintiff's name and label.

2d.—From their use of the two styles of bottles and labels,—the fluted and the round bottle imitation.

If the defendants had desired to sell their own article on its own merits, they would have made it as distinctive as possible, in order that it might not have been mistaken for the plaintiff's article or any other; if such had been their desire they would have chosen the name "Wood's Bitters" rather than "Atwood's Genuine Vegetable Physical Jaundice Bitters" or, at least, some original name; they would also have originated a label of their own, instead of substantially copying the plaintiff's label.

But "Wood's Bitters" had no reputation, and, therefore, no sale; the plaintiff's Bitters had a high reputation and large sales; this reputation had cost many years of labor, and many thousands of dollars expended in building up the business, in advertising, &c. The defendants were not willing to work, and spend, and wait for a reputation and sales, so they stole the plaintiff's name and label, and clothed their article in the dress and appearance of the plaintiff's article, to deceive the public and defraud the plaintiff.

Again, if the defendants proposed to do an honest business there was no reason why, after putting up their article in the round bottle style, they should adopt the fluted bottle style.

There is no pretence that their Bitters put up in the round bottle was in any respect different from their Bitters put up in the fluted bottle. They were identically the same, as they themselves admit. (Tes. of deft. John F. Wood, p. 161, q. 170; of deft. Nathan Wood, p. 178, q. 86.)

The reason of their selling under these two different styles is given by the defendant Nathan Wood. (q. 87, p. 178. "Why did you put up the same article in these two different styles of bottles and labels?"

Ans. "The market called for two styles, or rather the trade."

The defendants found a closer imitation than the round bottle style desirable, so they adopted the fluted bottle style. This style was sent to Massachusetts where the genuine article was so well known that it required a very clever counterfeit to deceive. The round bottle was too clumsy an imitation. (See tes. of Parker; p. 13.)

No honest dealer, or honest man would do business in this way. The defendants well knew that every bottle of the fluted bottle style, and a very large proportion of the round bottle style, was sold on the reputation of the plaintiff's article, and that the profits on every bottle so sold rightfully belonged to the owners of the plaintiff's article, and that they were robbing the plaintiff by the basest kind of robbery.

4.—The defendants' imitation was calculated to decieve. There can be no possible question as to the fluted bottle style, for that is so exact an imitation or counterfeit that but few purchasers, however experienced or careful, would detect the difference.

It is an almost perfect FAC-SIMILE.

The round bottle style is also calculated to deceive ordinary purchasers.

The name is substantially the same and so is the label, and then, the lying notice at the bottom of

the label, is calculated to assure the purchaser that he is purchasing the plaintiff's article.

One of the strongest proofs that the imitation is calculated to deceive, is, that *it was so intended* by the defendants; the defendants could have no possible motive for so imitating the plaintiff's name and label except to sell their article for the plaintiff's.

They knew how far to go in their imitation to produce this result; and it is fair to assume that they went far enough to accomplish their purpose.

That the defendants' round bottle style is calculated to deceive ordinary purchasers is a fact established by uncontroverted proofs. (Tes. of Charles F. Sanborn, pp. 38, 39. tes. of Sole. pp. 42, 43; of Hassard, pp. 48, 49; of Dorman, p. 108 q. 59; of Johnson, p. 117, q. 19; of Howe p. 129, q. 25; p. 132, qq. 29–31; of Parker p. 133, q. 14; pp. 134, 135, 136.) This overwhelming mass of testimony stands uncontroverted.

The law also presumes when one intentionally uses or closely imitates another's trademarks, merchandise or manufactures, that he does it for the fraudulent purpose of inducing the public or those dealing in the article to believe that the goods are those made or sold by the latter, and of supplanting him in the good will of his trade or business.

Taylor vs. Carpenter, 11 Paige, 292.

5.—The rule is that the Court will enjoin any imitation calculated to deceive ordinary purchasers.

Cases *supra*, and

Crawshay vs. Thompson, 4 Man. & G., 385;

Davis vs. Kendall, 2 R. I., 556;

Holmes vs. Holmes, 37 Conn. 278;

Wotherspoon vs. Currie, 22 Law Times (N. S.) 260;

Hookham vs. Pottage, 26 L. T. R. (N. S.) 755.

To be enjoinable it is not necessary that the imitation should be complete; the imitation may be limited and partial, and still enjoinable.

Lockwood vs. Boswick, 2 Daly, (N. Y.) 521;
Franks vs. Weaver, 10 Beav. 297;
Coffeen vs. Brunton, 4 McLean, 516;
Amoskeag Manuf. Co. vs. Spear, *supra;*
Shrimpton vs. Laight, 18 Beav., 164;
Walton vs. Crowley, *supra;*
Clark vs. Clark, 25 Barbour (N. Y.) 76;
White Lead Co. vs. Masury, *id.* 416;
Hostetter vs. Bowinkle, 1 Dillion. 329.

To be enjoinable it is not requisite that the imitation should be intentionally deceptive.

Millington vs. Fox, 3 Mylne & Cr. 338;
S. C. Am. T. M. Cas. 642;
Dale vs. Smithson, 12 Abb. Pr. R. (N. Y.) 237; S. C. Am. T. M. Cas. 282.

It is no defence that the imitator informs purchasers of the imitation. It is no answer for the defendants to say that they sold the Bitters as theirs.

Coats vs. Holbrook, 2 Sandf. Ch. 586;
S. C. Am. T. M. Cas. 20;
Chappel vs. Davidson, 2 Kay & J. 123.

It is sufficient to establish a case for relief to show that the imitation has lead or is likely to lead to mistakes.

Clement vs. Maddick, 5 Jurist. (N. S.) 592.

It is proved, as before shown, by the leading druggists and medicine men of New York and Boston, that purchasers are likely to be deceived into purchasing the defendants' round bottle style for plaintiff's.

George Sole testifies, p. 43, "I have known cases where young and inexperienced druggists have been

deceived and have received Exhibit B," (defendants' round bottle) "when they had sent for Exhibit A," (plaintiff's bottle.)

The plaintiff, in trademark cases, is entitled to relief, though the respondent did not know that the mark used was a trademark.

Kinahan vs. Bolton, 15 Irish Ch. 75;
Harrison vs. Taylor, 11 Jurist. (N. S.) 408;
Hall vs. Burrows, 10 *id* (N. S.) 55;
Ainsworth vs. Walmsley, 12 *id.*, 205;

But the defendants must have known that they were using trademarks which belonged to the successors of Moses Atwood. The Moses Atwood's Bitters was a well-known article in the medicine trade.

6.—The defendants acquired no rights to the trademarks by the purchase, or pretended purchase of the recipe from Moses Atwood. The latter did not sell or pretend to sell the trademarks. He had no right to sell the trademarks. He did not claim any, (See Points 7 and 8.)

7.—The defendant's position that plaintiff's trademarks have become common property by common use is not tenable.

The parties using the trademarks were the successors of Moses Atwood. The H. H. Hay Bitters are put up in the name of L. F. Atwood.

8.—The fact that the trademarks were used in common by the several owners thereof did not make them common property as to the world.

Bury v. Bedford, 10 Juv. n. s. 503;
Condy v. Mitchell, 26 W. R. 269;
Dent v. Turpin, 7 Juv. W. S. 673;
Motley v. Dowman, 3 My. & Cr. 1;
Robinson v. Finlay, 27 W. R. 294;
Weston v. Ketcham, 39 N. Y. Superior Court 54;

Rodgers v. Taintor, 97 Mass. 291;
Sohl v. Geisendorf, 1 Wilson (Ind) 60.

9.—There has been no such consent or acquiescence as to deprive the plaintiff of protection against continuing infringement.

Neither Moses Atwood nor any of his successors ever consented to the defendants' use of their trademarks, *expressly or impliedly*. There were no dealings between them, or other circumstances from which a consent could be implied. All the circumstances of the case negative all inference of any such consent.

There is no evidence in the case that the owners of the trademarks ever had the legal evidence to establish a case of infringement against the defendants.

The defendants were out of the jurisdiction of the Courts of the State in which the trademark owners resided. Were they obliged to go into a foreign jurisdiction to prosecute the defendants, in order to prevent an implied acquiesence in the use of their trademark by the defendants?

Besides, if there had been any such consent or acquiescence it was merely gratuitous and revocable at the pleasure of the owners.

Amoskeag Manuf'g Co. vs Spear. 2 Sandf. 599.
McCardel vs. Peck, 28 How Pr. R. (N. Y.) 120.
Gillott vs. Estabrook, 47 Barbour (N. Y.) 455.

Laches cannot be imputed to the owners. There is no case where relief has been refused on the ground of laches under circumstances like those in this case. Wherever relief has been refused on the ground of laches, the circumstances have been such as made it a case of great hardship for the party to be enjoined, as where the right to the trademarks has been in great doubt, or the dealings or relations between the parties have been such as to show con-

sent of the one and good faith of the other, and probable loss to an innocent party.

In this case the defendants are fraudulent infringers. Their course from the beginning, shows bad faith and dishonest conduct, as by their imitating the plaintiff's name and label so closely as they have in their round bottle imitation and by their almost *fac simile* fluted bottle imitation, &c. The defendants had no right to pirate the plaintiff's trademark; they have been wrong doers from the beginning. If the plaintiff cannot have protection for its trademarks, then its business is ruined, because its business depends upon its maintaining its trademarks. If either party is to suffer, it ought to be the defendants who are the wrong doers, instead of the plaintiff, the rightful owner.

No statute of limitations bars the plaintiff of protection of its trade-marks.

Taylor vs. Carpenter, 3 Story 458.

Taylor vs. Carpenter, 2 Wood & M. 1.

The plaintiff seeks protection against *future* wrong as well as indemnity for *past* wrong. The defendants persist in selling their imitation and threaten to continue such imitation in future unless they are restrained therefrom. There is no pretence that the defendants mean to desist from using their trade-marks unless restrained. No question of statute of limitations can arise as to such protection in the future.

As to the past, each infringement has been a separate trespass; possibly, the plaintiff may not have the right to recover damages for infringements committed more than six years before the commencement of the action.

It cannot be said that the defendants have acquired any prescriptive title.

The unlawful use of a trademark for twenty years held no bar.

Gillot vs. Estabrook, 48 N. Y. 374.
Ten years no bar, in
Wolfe vs. Barnette, 24 La. An. An.
Nine years held no bar, in
Lazenby vs. White, 41 Law Jour. (N. S.) Ch. 354.

SEVENTEENTH POINT.

The decree of the court below dismissing the bill of complaint should be reversed, and injunction ordered as prayed for in the bill.

Respectfully submitted,

PHILO. CHASE,

Counsel for Appellant.

108-218

OFFICE SUPREME COURT U.S.
FILED
OCT 24 1882
JAMES H. MCKENNEY, CLK.

SUPREME COURT

OF THE UNITED STATES.

IN EQUITY.

NO. 66, OCT. TERM 1882.

THE MANHATTAN MEDICINE CO.,

Appellant.

vs.

NATHAN WOOD, ET. AL.

Appellees.

APPELLANT'S BRIEF.

THORNDIKE SAUNDERS,

of Counsel with Appellant.

NEW YORK:

W. W. BARRETT & Co., Law and Job Printers, 62 Vesey Street.

1882.

BARRETT & Co., Print, 62 Vesey St., N. Y.

Supreme Court,

OF THE UNITED STATES.

THE MANHATTAN MEDICINE COMPANY,
Appellant.

vs.

NATHAN WOOD AND JOHN T. WOOD,
Appellees.

Appellant's Brief.

ABSTRACT OF CASE.

This Appellant was Complainant in a suit in the Circuit Court of the United States for the District of Maine, seeking to restrain appellees from infringing certain trademark rights—and other relief. (Rec. p. 4,) An answer was filed, testimony taken and the Court dismissed the bill. (Rec. p. 219.)

The questions presented by the pleadings and involved in this appeal, intended to be argued herein, appear in the opinion of the judge holding the Circuit, dated, September 21, 1878; printed by consent of Counsel, as "Addition to Record 66," and they are as follows:

1.—Appellant's title to the bottle and label described.

2.—Appellees' infringement of the same and their intent.

3.—Public use of the same.

4.—L. F. Atwood's and H. H. Hay's rights.

5.—Appellees' claim of title.

6.—Use by some of appellant's assignors of label etc. on weakened preparation.

7.—Trespassing by some of appellant's assignors upon each other.

8.—Relinquishment of old, and adoption of new label etc. by some of appellant's grantors.

9.—Delay in suing.

The decree is deemed erroneous in dismissing the bill for that

1.—The Complainant's case was sustained by the evidence.

(a) He had title.

(b) Respondents had infringed.

2.—The defences were not sustained by the evidence.

And upon the several points or questions involved as above stated, the learned judge, we respectfully submit, has erred in his findings.

BRIEF OF ARGUMENT.

POINT I.

Appellant had an exclusive right to the trademark.

(a) Assignors of appellant's assignors having purchased a certain trademark (with other things) from Moses Atwood, (the original proprietor, (Opin. p. 3,) in 1855, about that time made certain additions to it, and continuously since then, and to the time of assignment to appellant, they and their assignees have used it on their preparation—appellant has continued such use.

Rec. p. 23, 25, 27 to 30, 32, 33, 35, 37, 38, 39, 42, 47, 48, 53, to 59, 67, to 69, 77, 79, 84, 85, 86, 88, 90, 91, 92, 93, 94, 95, 102, 104, 142, 143, 184.

This establishes appellant's title

Cong. & Empire Spring Co. vs. High Rock Cong. Spring Co. 45 New York, R. 291.
McLean vs. Fleming, 6 Otto, 245.
Coleman vs. Crump, 70 N. Y. 573.

(b) Meantime since 1861 appellees have been using a bottle and label of similar appearance to those used by appellant and his assignors, so similar that it deceived the ordinary purchaser,

Rec. 13, 14, 15, 38, 39, 42, 43, 45, 48, 49, 73, 108, 117, 129, 132, 133, to 136, 151, 152, 171.

and so infringed.

McLean vs. Fleming. 6 Otto, 245, 251.
Gillott vs. Esterbrook, 48 N. Y. 374.
Meriden Brit. Co. vs. Parker 39 Conn. 450.

(c) And this they had done intentionally, and therefore fraudulently,

Browne on trademark p. 501.

and though this is not necessary to obtain an injunction,

McLean vs. Fleming, Supra.

Singer M'f'g Co. vs. Wilson, 26 Weekly. R. 666, 667,

it is important upon the question of damages and as to the findings of the learned justice.

Appellees knew they assumed and used the trademark wrongfully; they could not have supposed otherwise.

R. 21, 58, 59, 93, 95, 107, 117, 122, 158, 171 to 173, 175, 180, 184, 192, 193, 203, 204, 217.

POINT II.

Defences were not sustained by the evidence, and the learned justice erred in his findings of fact and of law as to these matters.

(a) There is no testimony in the case as to any public use.

(b) L. F. Atwood and his assignee Hay, had only the right to use the recipe. None to the label or bottle.

Rec. 80, 113, 219.

(c) Appellees had purchased the prescription from one who had no right to sell it, (Rec. 58, 59, 93, 95, 117, 186, 202, 204, 217,) but there is no evidence that they had bought the trademark, or even supposed they had.

And see point 1 (c)

(d) Use of label on weakened preparation by some of appellant's assignors is shown.

Rec. 66, 70, 73, 74, 76, 81, 212.

But these were sold at a less price by one person only, and these transactions were years ago.

The rule invoked by the justice, is confined to the complainant, in *the* action.

His hands must be clean, is the burden of the decisions. He is the one who must use a spurious, worthless, deleterious compound in order that the Court can refuse to him protection.

Codd. Dig. L. of Tradem. pp. 530–543.
Phalon vs. Wright Cox, Am. tradem. 311.

(e) The disregard of allotted districts, or trespassing upon each other by some of appellant's assignors appears Rec. 82.

But, while this may subject them to actions *inter se*, it does not affect title transferred by them all.

(f) The relinquishment of the old bottle, and the adoption of a new one, goes only to a part of the trademark, there is no evidence of relinquishment or abandonment of bottle, label and directions, and adoption of new and different labels etc. The evidence is of change of parts of the trademark, addition of new parts, and these have been long in use by the plaintiff and his predecessors.

See Citations under point 1 (a)

This they had a perfect right to do without forfeiting protection.

Lemoine vs. Gauton, 2 E. D. Smith, 343.

(g) Remedy of appellant was not lost by delay of 14 years. There was no abandonment or dedication to the public, quite the contrary. Rec. 79.

The evidence must be strong enough to show this to make such defense available.

Gillott vs. Estabrook, 48 N. Y. 374.
S. C. 47 Barb. 455.
McLean vs. Fleming, 6 Otto, 245.
Amoskeag M'f'g Co. vs. Garner, 55 Barb. 151.

It is respectfully submitted that nothing is to be deemed waived by appellant or admitted to appellees by omission thereof in foregoing brief.

This is thought to contain sufficient reason for reversal, but as it is the result of late and limited study of the questions involved, reliance, as to all points not herein covered, is placed on the brief, submitted by the learned Counsel who has been identified with this case from its begining.

THORNDIKE SAUNDERS,

of Counsel with Appellant.

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SUPREME COURT OF THE UNITED STATES.

IN EQUITY.

MANHATTAN MEDICINE CO.,

v.

NATHAN WOOD, ET AL.

BRIEF OF THE APPELLEES.

WILLIAM HENRY CLIFFORD,

Counsel of Appellees.

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SUPREME COURT OF THE UNITED STATES.

IN EQUITY.

MANHATTAN MEDICINE CO.,

v.

NATHAN WOOD, ET AL.

BRIEF FOR APPELLEES.

This is a bill in equity, praying for an account, and for an injunction against the defendants, on account of the alleged unlawful use, by them, of a certain Trade-mark, set up as the exclusive property of the complainants.

The complainants claim title through certain assignments [found in the record, to which reference will be hereinafter made], and allege as to the origin of the property in the said trade-mark, as follows:

"That your orator is informed and believes, and alleges that said medicine was first invented and put up for sale about twenty-five years ago, by one Dr. Moses Atwood, formerly of Georgetown, Massachusetts, by whom, his assigns and successors, the same has been ever since made and sold, by the name, in the manner, and with the trade-marks, labels and description, the same, or substantially the same as aforesaid."

Under the allegations of their bill, the appellants claim title through some alleged intervening owners, from one Moses Atwood, then of Georgetown, Mass.

The defences are :

1 Moses Atwood claimed no trade-mark of his own and sold none to the complainants, appellants.

2 The complainants' title is defective.

3 If there ever was any trade-mark on this medicine used by Moses Atwood, it was forfeited by the assignors of the complainants by neglect and by fraud.

4 The appellees have, and for many years have had the right to use the bottle and label under which they sell the medicines put up by them.

The "assigns and successors" of Moses Atwood, sold the right, whatever it was, to the complainants.

Let us look first to the question, what the "assigns and successors" of Moses Atwood really took from him, and were in consequence able to grant to these complainants.

This is properly a preliminary question, because if the "assigns and successors" never had any trade-mark at all from Moses Atwood, then they could not, under the allegations of the bill, assign any to the complainants.

Now the "assigns and successors," as appears from the documentary evidence introduced by the complainants, are, in the first place, L. H. Bateman and his heirs. Second, Moses Carter and his heirs, successors and assigns.

In order, therefore, to know clearly and from the beginning, what the persons who sold to the Manhattan Medicine Company really had to sell, we look to find what they got from Moses Atwood.

L. H. Bateman's.

On page 23 of the printed record is found the deed to the Manhattan Medicine Company, from the heirs of L. H. Bateman. Now this deed claims no right at all as derived from Moses Atwood, and makes no mention of any such right. It seems from the deed itself, to be a right which began and ended with the Bateman family.

This piece of documentary evidence has no tendency to support any allegation of the bill, but flatly contradicts it.

This contradicts the fundamental allegation of the bill, viz., the one showing the title of the complainant to the alleged property.

If Moses Atwood had the exclusive right to this trade-mark at the outset, and never transferred a right to Bateman, then Bateman's right must have been derived from some other man, or else obtained by trespass upon, and in violation of Moses Atwood's rights.

Now the right of property in a trade-mark is an exclusive right.

If such right is assumed by another, and the assumption acquiesced in, the exclusive right of the original owner is necessarily gone.

If that be so, then no after coming person can claim the exclusive right to the alleged trade-mark, both from the person who first had it, and the person who destroyed it, and used it by virtue of having destroyed the legal rights of the first owner.

The purchase from Bateman by the complainants' appellants was an admission of his right which was acquired adversely to the rights of the assignors of the complainants.

This is the position, however, in which the complainants' case is placed by their allegations and evidence.

1 They claim title to a trade-mark, through intermediate owners, from Moses Atwood alone.

2 They put in evidence a deed to themselves from L. H. Bateman, who does not claim to have derived title from Atwood.

3 Then either Atwood was not the lawful owner of the trade-mark, or Bateman took it from him, and was permitted by Atwood to keep it.

That this position is correct, and sustained by the complainants' own evidence, I now propose to show.

On page 142 of the printed case, is introduced by complainants, an affidavit of this same Moses Atwood. In this, he says:

"I have Before me this morning a circular of one L. H. Bateman, purporting to have the wright to manufacture and sell the said above named Bitters, and states that when Moses Atwood, in 1855, left the town of Georgetown Mass. that said Atwood lef with the said L. H. Bateman the original recipe for the manufacture of said Bitters. I hereby testify that said circular is a libel and a fraud intentionally gotten up by said L. H. Bateman for the purpose of defrauding the wrightful owner M Carter & Son, formerly Carter, Dodge & Co. and Mr. Carter and Sons, and for the purpose of putting a spurious artickel of medicine on the public, receiving the public's money By false pretences, and to cast a slander upon the said Moses Atwood. I also certify that I, Moses Atwood, did sell all my wrigh interest and claim in and to my invention in the said Atwood Vegitable Physical Jaundice Bitters to Carter, Dodge & Co" &c.

Thus we see that the Bateman heirs are clearly not among those "assigns and successors" of Moses Atwood, from whom the complainants claim, because, they do not pretend to be such, and Moses Atwood testifies, for complainants, that they are not.

Then the complainants got no title to any trade-mark, whatever, through the Bateman heirs, as derived from Moses Atwood.

The next "successor and assign" of this alleged trade-mark from Moses Atwood, is Moses Carter.

The earliest evidence in any form relative to this man's ever having anything to do with Moses Atwood, is found on page 137 of the case.

This is a contract between this Moses Atwood and Moses Carter, wherein Atwood agrees to sell to Carter all "bills against local agents," and "the right to sell," a long list of medicines, in certain named towns. The medicines are sold to Carter by Atwood, by the barrel and by the gallon.

Nothing is intimated even that any trade-mark ever existed.

This is the original document of transfer from Moses Atwood to Moses Carter, of certain medicines, and put in by the complainants as the foundation of their title to the alleged trade-mark in this case. The date is January 1, 1848.

On page 139 is found the second document or assignment, and the only other one in the case, to show the transfer from Moses Atwood, to any of these "successors and assigns," from whom the complainants pretend to derive their right of property in a certain trade-mark.

This is called a "contract to settle some doubts and supply some missions" in agreement of December 25, 1851.

This paper of December 25, 1851, is not in evidence in the case, therefore we are in ignorance of its contents.

But this one which thus refers to it is dated September 29, 1852.

In this agreement there is not the remotest intimation of the sale of any trade-mark, or that there ever was any such thing. This contract is simply one regulating under certain conditions, the sale of a lot of medicines, and includes the right to use Moses Atwood's name on labels. That is all.

No trade-mark is described or portrayed, and the word trade mark, or trade-mark right, or privilege, or anything of that sort is wholly absent from the paper.

To recapitulate; these two primary successors and assigns were L. H. Bateman, Moses Carter.

1 Bateman had no title from Moses Atwood, for he does not pretend to, and Moses Atwood, complainants' witness, swears he never had any.

2 Moses Carter never had any trade-mark from Moses Atwood, for the documents show that none such was ever sold to him.

Thus we observe that at the beginning of these transactions, no trade-mark was sold to anybody.

Under the allegations of this bill, a right to a trade-mark must be shown to have been derived from Moses Atwood.

See bill, page 2, ¶ 3.

None such is shown.

When we came to read the deeds made out in 1875, from a variety of persons to these complainants, then we find the term trade-mark most frequently employed.

All of the assigns, except Bateman, claim mediately from this Moses Atwood, who made medicines by barrel or gallon, and gave the right to sell them, to Moses Carter, by the papers on page 137 and page 139 of the record.

Now under this bill, just exactly what those papers show Atwood to have sold to Carter, is what the assignors of the complainants sold to the complainants. This is plain, because the complainants, in their bill, base their claim to a trade-mark, by mesne assignments on Moses Atwood's deed to Carter.

If this proposition is correct, then all that Moses Carter ever got from Moses Atwood was his formula and recipe, and the only things that Carter and Dodge got from Atwood were the same, with the addition of the right to use Atwood's name.

But this right to use Atwood's name was not a trade-mark of any particular single article. It was to be used on a whole list of medicines and indiscriminately.

And the term "Atwood's Bitters" is not sufficient to particularize this compound.

Howe, appellants' witness, page 131.

This fact that "Atwood" was to be applied to several medicines, is clearly shown by the evidence of the complainants.

First, the contract of September 29, 1852, p. 139, of the printed case, viz.: "Said Carter and Dodge are to have the right to use said Atwood's name on the labels and circulars, and to manufacture and sell the following medicines, viz.: Atwood's Vegetable Jaundice Bitters, Atwood's Compound Extract of Sarsaparilla, Atwood's Dysentery Drops, Atwood's Rheumatic and Spinal Elixir," etc.

Thus we see that this "right to use Atwood's name," spoken of in the contract of September 21, 1852, was simply to print "Atwood" at the head of the titles of all these medicines.

This is proved by the evidence of B. S. Dodge, one of the chief of complainants' witnesses.

Being inquired of as to what Carter & Dodge really bought of Moses Atwood, the following questions and answers occur, page 95:

Dodge: p. 95.

Cross-Int. 32. How much did you pay Atwood for the recipes of the medicines you have named in your direct examination?
Ans. Between four and five thousand dollars.

Cross-Int. 33. Was this paid down, or out of the profits of the business?
Ans. Most of it down.

Cross-Int. 34. How was the rest paid?
Ans. Short time afterward.

Cross-Int. 35. How long?
Ans. I couldn't say.

Cross-Int. 36. Was, or not, his pay, in part, to come from the profits of the business?

Ans. It was not.

Cross-Int. 37. Was there anything in the first paper to you from Atwood except a sale of the recipes for the various medicines?

Ans. I don't remember of anything else.

Cross-Int. 38. Was there anything said about any trade-mark or marks?

Ans. We bought everything he had, and supposed we stepped into his shoes. The right to use his name was mentioned.

Cross-Int. 39. Was there anything said about any trade-mark or marks at the time of this sale to you?

Ans. There was.

Cross-Int. 40. By whom, what was it, and to what did it refer?

Ans. I do not remember. Talked about trade-marks, that is the most I remember about it.

Cross-Int. 41. What trade-mark was talked about?

Ans. His trade-mark—his name.

Cross-Int. 42. Was that what was then considered the trade-mark?

Ans. I suppose it was.

So also in **Luther F. Carter's** testimony: p. 77.

Int. 141. When did you last see the paper referred to by you in your cross-examination as the paper or agreement by which Moses Atwood conveyed to Carter & Dodge or Carter, Dodge & Co., his entire interest in his Bitters business, except his right to sell them beyond Illinois?

Ans. I have not seen it since about the time Carter, Dodge & Co. brought the suit against Bateman.

Int. 142. Have you made a search for said paper, and if so, how and where?

Ans. I have made diligent search among my father's old papers, in the winter of 1874-5.

Int. 143. Have you made inquiries for it?

Ans. I have.

Int. 144. Have you made a careful and diligent search for the paper where it might be expected to be found?
Ans. I have.

Int. 145. And have you, after such careful and diligent search, been unable to find such paper or get information of its whereabouts?
Ans. I have.

Int. 146. State as nearly as you can, the date of this paper?
[Objected to.]
Ans. Sometime in 1855.

Int. 147. From whom and to whom was the paper executed?
[Objected to.]
Ans. From Moses Atwood to Carter, Dodge & Co.

Int. 148. By whom was it signed?
[Objected to.]
Ans. By Moses Atwood.

Int. 149. State the contents of it, as nearly as you can?
[Objected to.]
Ans. It gave them all the rights and privileges in the business, to manufacture and sell the medicine, and to use the Moses Atwood's name; and there was also a Power of Attorney from Moses Atwood to them. By the medicine, I mean the Atwood's medicines; there were different kinds, to wit:—and then follows the list already found in the contract on p. 139.

It is thus most clearly shown both by the contract with Carter & Dodge, and by Dodge's and Carter's testimony, that this right to use Atwood's name, was the right to prefix the titles of all of these medicines with such name, and nothing more.

The right was not limited to the medicine referred to in this case, and therefore constituted no trade-mark for that particular medicine.

But attempt is made in complainants' testimony to establish by means other than the documents referred to, that a "trade-mark" was really thought of when Moses Atwood sold to Carter, by the contract of January 1, 1848, page 137, and when he signed the contract of September 29, 1852.

Such attempt is found in the examination of Luther F. Carter, son of Moses Carter, and by the B. S. Dodge, above quoted.

Extracts from the testimony of both will show not only that the attempt wholly fails, but will also show that the proposition of the respondents is correct, viz.: That no trade-mark at all was ever sold by Moses Atwood to anybody.

First, **L. F. Carter,** as to the document of January 1, 1848, page 137, says on p. 66,

Int. 22. Is the contract of date Jan. 1, 1848, the one through which you supposed your father derived his title to this article from Moses Atwood?
Ans. It is not.

Int. 23. Have you, or have you seen, any other document purporting to grant to your father from Moses Atwood the right to this article, with its bottle, label and title?
Ans. I have seen such a document, in connection with Benj. S. Dodge, and Carter, Dodge & Co.

Int. 24. Do you know where that paper now is?
Ans. There were different papers, I think, from 1852, the last in 1875. The last, Mr. Chase has a copy of, the original, I don't know where it is.

Int. 25. How many papers do you think there have been executed from Moses Atwood to your father? Any beside the one of Jan. 1, 1848?
Ans. I don't know of any but that.

Int. 26. Do you know of any papers giving the right to make this medicine and use the alleged trade-mark, as now set up, given by Moses Atwood to your father?
Ans. I do not, not to my father alone.

Int. 27. Were there any papers, or paper, giving the right to the preparation of the medicine and to the bottle and label, as now set up, given by Moses Atwood to Carter & Dodge?

Ans. There were papers given to Carter & Dodge, giving them the right to manufacture the Bitters, using Moses Atwood's name. I know nothing about the bottle.

Int. 28. Do you know where those papers are now?

Ans. I do not.

Int. 29. When did you last see them?

Ans. I cannot tell.

Int. 30. Did they ever come into your possession?

Ans. I don't know that they ever did.

Int. 31. If they were ever in your hands, to whom did you deliver them?

Ans. If they were ever in my hands, I delivered them to Eli B. Johnson.

Int. 32. How did it happen that you gave them, if you did, that you gave those papers to him, upon what representation of his, or upon what knowledge of your own, as to who he was, or whom he represented?

Ans. If I gave them to him I did it because he was the man that I did the most of the business with in making the transfer to the plaintiff. He that time wished for all the old papers I had as coming from Moses Atwood.

Int. 33. Did he say in substance that he was acting for or in behalf of the plaintiff?

Ans. He gave me to understand that he was acting for the plaintiff.

Int. 34. Have you any doubt that you gave that paper or papers to him? Have you seen them since?

Ans. I gave him all the papers I had relative to the right coming from Moses Atwood; I have not seen it since.

Case, page 66-7.

Same witness, p. 68.

Int. 42. Were there any papers giving a right to prepare this medicine, and use the bottle, label, etc., as claimed by plaintiff, from Moses Atwood to M. Carter & Son?

Ans. I don't know that there was.

Int. 43. Were there any such from Moses Atwood to M. Carter & Sons, or to you?

Ans. I don't know that there was; none to me certainly.

Int. 44. Do you know whether Benjamin S. Dodge had any paper from Moses Atwood to said Dodge, giving him, personally, the right to put up the medicine, and use the label and bottle now claimed by the plaintiff?

Ans. I do not know that he did have, personally.

Int. 45. Do you not know from Dodge, directly or otherwise, that he did not have any such permit?

Ans. I do not know.

Case, page 68.

Same witness.

Int. 59. What interest did Carter & Dodge own in the right to the medicine and to the use of the label and bottle, as now claimed by plaintiff at the time of their dissolution?

Ans. I suppose they owned the entire right to the bottle with the lettering blown in the glass, and the label. I don't mean that they claimed the fluted bottle without the letters blown in it.

Int. 60. Do you know what right they owned at the time of their dissolution, of your own knowledge, except as shown by said paper of Jan. 1, 1848, to your father?

Ans. They owned all the right in Atwood's Bitters, to manufacture and sell them, except what Mr. Atwood reserved.

Int. 61. Do you know that they, before their dissolution, owned all but what Atwood reserved, of your own knowledge?

Ans. I know I have heard them make the statement that they owned all but what Atwood reserved.

Int. 62. Is this, sir, what you have heard them say, the foundation of your knowledge upon this subject?

Ans. It is, and with the acknowledgement of Mr. Atwood with regard to it.

Case, page 69.

The testimony of **B. S. Dodge,** is equally clear on this point.

In speaking of the contract between Carter & Dodge, and Moses Atwood [see page 252 of the case], first made [i.e., the one not in the case, but of date December 25, 1851], he says:

Cross-Int. 37. Was there anything in the first paper to you from Atwood except a sale of the recipes for the various medicines?
Ans. I don't remember of anything else.

Cross-Int. 38. Was there anything said about any trade-mark or marks?
Ans. We bought everything he had, and supposed we stepped into his shoes. The right to use his name was mentioned.

Cross-Int. 39. Was there anything said about any trade-mark or marks at the time of this sale to you?
Ans. There was.

Cross-Int. 40. By whom, what was it, and to what did it refer?
Ans. I do not remember. Talked about trade-marks, that is the most I remember about it.

Cross-Int. 41. What trade-mark was talked about?
Ans. His trade-mark—his name.

Cross-Int. 42. Was that what was then considered the trade-mark?
Ans. I suppose it was.

Cross-Int. 43. Was not that what you supposed it was when you bought, and what was then understood to be it?
Ans. It was.
Case, pages 173, 174.

Cross-Int. 47. And so you purchased the right to use that name as a trade-mark, did you not?
Ans. Yes.

Cross-Int. 48. The matter was well understood between you at that time, was it not?
Ans. I don't understand the inquiry.

Cross-Int. 49. I mean whether you and Carter and Atwood were then acquainted with that medicine, so as to understand the nature of the bargain you made?

Ans. I suppose we were.

Cross-Int. 50. It was then known to you, was it not, that the name of Moses Atwood was the trade-mark of the medicines, the recipes for which he sold you?

Ans. It was.

Cross-Int. 51. Did the change from the smooth round bottle to the twelve-sided one affect your sales of the medicine, so long as Moses Atwood's name was on the labels?

Ans. I don't know that it did.

Cross-Int. 52. Did Moses Atwood claim any right in connection with this medicine, except the right to the exclusive use of his name to show whose Bitters these were?

Ans. Yes; he claimed all the right there was.

Cross-Int. 53. Was there at that time any other right than the right to the recipes and the use of his name?

Ans. That is all that I know of.

Case, page 96.

Thus it is admitted by complainants' witnesses, that at the time the sale was made by Moses Atwood to Carter & Dodge [from whom complainants claim], the only thing sold was the recipes and the right to use Atwood's name.

This L. F. Carter and B. S. Dodge, are the two only witnesses introduced by complainants to help out the evidence of the two contracts on pages 249 and 252.

Both admit that there was no right in the nature of any trade-mark ever pretended to be sold, except the use of Atwood's name prefixed to a long list of articles of medicine.

On page 182 on redirect the matter of the testimony of these two witnesses, is attempted to be fixed up, but with what success, the court will judge. It is as follows:

Direct Resumed by Mr. Chase.

Int. 78. What did the purchase by Carter & Dodge from Moses Atwood, in 1855, embrace?

Ans. All his stock and materials for manufacturing medicines and accounts; the whole of his medicine business.

Int. 79. Did it, or not, also embrace all of Moses Atwood's trade-mark rights in respect to his medicine business?

Ans. It did.

Int. 80. What did Moses Atwood deliver to Carter & Dodge in pursuance of the sale?

Ans. All his accounts, receipts, medicine left with dealers on commission, and all his stock and materials.

Int. 81. Did, or not, such stock and materials include Moses Atwood's labels, bottle mould and unfilled bottles?

[Objected as to form and otherwise.]

Ans. It did.

Int. 82. Do you mean that Atwood conveyed to Carter & Dodge, all his right, title and interest in all said Atwood's medicines of the several different kinds, and the business thereof, and his rights therein?

[Objected as above.]

Ans. Yes.

Even at that late stage in the examination it was difficult to have the witness talk about anything so foreign to his ideas as a "trade-mark," until it was put into his mouth by the interrogatory.

Thus at the beginning I have discussed the primary question. Was any trade-mark claimed by Moses Atwood in 1848?

Did he pretend to sell any such thing to Moses Carter [the first assignee] or to Carter & Dodge [the second], as exclusively applicable to the particular medicine referred to in this case?

It seems plain that no such claim was made or thought of at that time, and no pretense of any such sale set up.

Then it is claimed in the first place that at the time of the first derivation of title from Moses Atwood, as pleaded in the bill, there was not any trade-mark bought or sold.

In order to clearness it may be well now to state in order, the sales or transfers upon which the complainants rely to show their title to a trade-mark. They are as follows:

1 Contract with Moses Carter, of January 1, 1848, page 137.

2 Then Carter made a partnership with B. S. Dodge [complainants' witness], and then came the omitted or lost contract of December 25, 1851.

3 This, it seems, was between Atwood& Bingham, and Carter & Dodge.

4 Then came the contract of September 29, 1852, page 139, of the case.

There was first Moses Carter alone who had had dealings with Moses Atwood.

Then Carter & Dodge, then Carter, Dodge & Co., then M.

Carter & Son, then M. Carter & Sons, then M. Carter & Son again.

Carter's Deposition, Case pages 55, 56, Ints. 30–44.

Then upon this point of the title of the complainants to any trade-mark derived from Moses Atwood, their case is defective.

1 In not showing that Moses Atwood ever had any trade-mark himself.

2 In not showing that he ever sold any to the assignors of the complainants or their predecessors.

3 In not showing that he had any article of manufacture then so well known, or of such value, as to be bought and sold and recognized in the market, by any designating word or words, sign mark or symbol, as would possess value as a trade-mark on such goods.

4 In not accounting for the share owned by Bingham.

This I propose to examine briefly.

Most of the evidence upon this point introduced by the complainants is of no value, because, relating to a time considerably later than the date of 1848 or 1851, when Atwood is shown by the complainants' evidence to have sold his recipe to Carter, and then to Carter & Dodge.

The witnesses are as follows:

HENRY, page 32.

Ans. 6. Known the medicine twenty years.

SANBORN, page 38.

Known the medicine twenty years.

SOLE, page 42.

Known the medicine twenty years.

HASSARD, page 47.

Known the medicine twenty years.

HOWE, page 128.

About twenty years.

None of these witnesses therefore, throw any light upon the question of what reputation, if any, there was attached to any trade-mark upon any manufacture of medicine by Moses Atwood, in 1848, or 1851.

The testimony of L. F. Carter and B. S. Dodge, are the only ones from which it is necessary to make any quotation.

Carter says of the early putting up of the medicine, and the bottle, etc., as follows:

Page 54.

Int. 14. Did you ever work for said Moses Atwood, or assist him in his business, while he was putting up and selling said medicine at Georgetown?
Ans. I have worked for him, putting up the medicine.

Int. 15. When did you so work for him?
Ans. Well, somewhere from 1850 to 1853.

Int. 16. How much did you work for him in putting up said medicine between 1850 and 1855?
Ans. I should say from three to six months.

Int. 17. How old was you when you so worked for him?
Ans. Some fourteen or fifteen years old.

Int. 18. What did you do in respect to putting up said medicine while so working for Atwood?
Ans. I drew the medicine from a cask, filled the bottles, corked, sealed and labelled them, in connection with my brother.

Int. 19. Describe the bottle and label as then used by said Atwood in putting up said medicine?
Ans. It was a round, smooth, plain, eight ounce bottle, no lettering. The label was similar to the label on said Exhibit "A."

Int. 20. How did said bottle compare in size, thickness and height with said bottle, Exhibit "A"?
Ans. Bottle was about same size and height, and a little less in diameter.

Int. 21. What marks, if any, did this round bottle have on it?
Ans. Not any.

Dodge says, page 85:

Int. 39. What kind of a bottle did Carter & Dodge use for the Bitters?
Ans. We commenced with a round, smooth bottle, such as Exhibit F, which is one of the original bottles and labels.

Int. 40. Was this bottle and label F, the bottle and label used by said Moses Atwood, previous to his transfer to Carter & Dodge?
Ans. It was.

Int. 41. How long did Carter & Dodge use bottle and label, Exhibit F?
Ans. I think about three years.

Int. 42. When was bottle and label, Exhibit "A," adopted?
Ans. About 1855.

Int. 43. By whom?
Ans. Carter & Dodge, I think.

Int. 44. Did Carter & Dodge procure the mould to be made for the bottle, Exhibit "A"?
Ans. We did.

Int. 45. Thereafter did Carter & Dodge and Carter, Dodge & Co., use the bottle and label of which Exhibit "E" are fac similes?
Ans. We did.

Howe, page 128, says as follows:

Int. 2. Were you acquainted with Moses Atwood, formerly of Georgetown, Mass.?
Ans. Yes.

Int. 3. What business was he engaged in when you knew him?
Ans. Putting up a preparation known as Atwood's Jaundice Bitters.

Int. 4. When was that?
Ans. Between 1850 and 1856.

Int. 5. Did you have business dealings with him in respect to his Bitters business; if so, what?
Ans. I did. I sold him the materials for making it and the bottles.

Int. 6. State, as nearly as you can now, between what years you sold him bottles and materials for his Bitters?
Ans. I think between 1850 and 1856.

Int. 7. In what quantities did you sell him materials and bottles for his Bitters?
Ans. I sold him alcohol by the several barrels at a time, oil of anise by quite a quantity, and a case of aloes at a time, and we sold him ten or twenty cases of glass bottles at a time. A case, I think, contained three gross, may have contained five gross.

Int. 8. Describe the kind of bottles which you sold him for his Bitters.
Ans. An eight ounce, plain prescription, long, like Exhibit F. Not positive whether we furnished him any like Exhibit A. Moses Atwood had no letters blown in the glass.
And on page 130.

Int. 10. Was, or not, the bottle, Exhibit A, named and known on the lists, in your trade, as a fancy or fluted prescription bottle of a certain capacity?
Ans. Yes.

Int. 11. Do you, or not, remember that the form of bottle like Exhibit A, with the letters blown in the glass, were first used to contain these Bitters by Carter & Dodge?

Ans. I have that impression. I don't think Moses Atwood had any private mould.

From this it appears that at the date of the sales (1848) to Carter (and 1851) to Carter & Dodge, the complainants have failed to show that Moses Atwood had adopted, or pretended to have adopted, any trade-mark at all.

When he made the sales, therefore, evidenced by the contracts of 1848 and 1851, he was selling in the first instance, the recipes and some old bills for collection, and in the second, the right to prefix his name to a list of medicines named in the paper.

He had put up his medicines in a long, smooth bottle, Exhibit F. This was no designating mark, because Carter & Dodge, after they began to sell, changed it to another form, and Atwood changed also.

The complainants allege in their bill that Moses Atwood was the originator of a certain trade-mark—that he assigned to certain others, and that they, the complainants, bought of those assignees of Atwood. The evidence they have introduced on this point, is an effort to sustain that allegation. But the evidence fails to show that Atwood had any fixed and established trade-mark for his medicine. It fails to show that his successors put up the medicine in the same manner as he did, and it

not only fails to show that the complainants have acquired whatever bottle, label, etc., that Atwood used, but shows clearly that they used something quite different.

In order to a full and complete understanding of the case it now becomes necessary to give a brief history of the medicine to which the alleged trade-mark of the complainants is sought to be applied.

In 1848 or prior, one Moses Atwood, then of Georgetown, Mass., was in possession of the recipes of some five or six medicines.

It appears that at this time he had put up some of the medicine, but in what form, the complainants' evidence gives no clue. From the indications in the contract of January 1, 1848, (page 137), it would appear that they had been put up by barrel or gallon.

At this time Atwood made an agreement with Moses Carter to sell him certain bills outstanding against local agents, and the right to sell the medicines in certain specified places. From this original contract, it seems that Moses Atwood retained the preparation of the medicines to himself, and the contract does not show that he did, or agreed to, disclose his formulæ to Carter. The medicines were, under this contract, sold to Carter by the barrel and gallon. Among these medicines was one called Atwood's Jaundice Bitters. This is the one the complainants now claim a trade-mark upon, under the title of Atwood's Vegetable, Physical Jaundice Bitters. When these medicines were sold to Carter, he had the right to resell them in certain named places. This was all the contract of 1848 amounted to. In 1852 Carter made a partnership with B. S.

Dodge [one of the complainants' witnesses], to make and sell "Atwood's Vegetable Medicines and Essences.". That contract is to be found on page 138 of the record. It would appear from the phraseology of this document, that they had then obtained the right to put up and compound, as well as sell these medicines. This paper was of date February of 1852. In September of that year, Moses Atwood and one Bingham made another agreement as appears by the evidence, with Carter & Dodge, which is to be found on page 139 of the record. This it seems, was to "supply omissions and settle doubts," in a prior contract of 1851. The complainants do not produce this paper of 1851. But it is not in the case, and its loss is not satisfactorily accounted for. But this paper of September, 1852, somewhat enlarges the things granted to Carter & Dodge over what they had had before. It gives them the right to use Moses Atwood's name "on the labels and circulars" of all this list of medicines, and the territory is more enlarged than in the contract of 1848. It included a large part of Massachusetts, and portions of other States. It included several other conditions not necessary to be mentioned now. The peculiarity of the paper is this in its relations to this case.

1 It does not sell any trade-mark at all.

2 It only gives the right to use Atwood's name on labels and circulars of medicines which Carter & Dodge are permitted to sell in certain territory, and "not to sell" "in any other portion of the world."

Under this contract, Carter & Dodge started their business. Subsequently one C. L. Carter came into the firm, and the articles of co-partnership, on page 137, were changed, by making them articles of three parties instead of two, and by the interlineation of C. L. Carter's name, as appears by an inspection of those articles, and from the testimony of B. S. Dodge [page 84,

Int. 13]. After this the business was carried on by a number of firms in succession. After Carter, Dodge & Co., came M. Carter & Son. When the firm of Carter, Dodge & Co., dissolved, Dodge went out and continued to carry on the business of putting up and selling these medicines by himself alone. Then a firm called M. Carter & Sons, succeeded to M. Carter & Son. Then came another firm of M. Carter & Son. This firm sold whatever right they had to the complainants. During this time, however, that is, during the existence of the firms of M. Carter & Sons, and M. Carter & Son, Dodge sold a right to one Will B. Dorman, who also carried on the business of making and selling this medicine. During the same time also a man by the name of L. H. Bateman, in the same village of Georgetown, for many years, carried on the same business, without any connection with the Carters or Dodge, but as their chief competitor as Luther Carter says [page 57, Int. 52]. B. S. Dodge also sold a right to Noyes & Manning, of Mystic Bridge, Connecticut, and they also carried on the same business up to 1875, when they sold to the complainants. Dodge did his business at Rowley, Mass., after he left the firm of Carter & Dodge, and Carter, Dodge & Co. All these parties—Luther F. Carter [M. Carter & Son], Bateman, Dorman, Dodge and Noyes & Manning, in 1875 [a few months before this suit was begun], sold to the complainants. It is on this that complainants base their right to the alleged trade-mark.

Thus it will be perceived that all of them except this Bateman, derive their claims to whatever they considered they sold, from the two papers, the agreements of 1848 and 1852, before referred to. Bateman had no right from Atwood. This title of the Carters' is attempted to be aided by an affidavit of Moses Atwood, on page 142 of the record. In this the affiant is clearly mistaken in the extent and amount of territory he swears he gave to Carter & Dodge; because he refers to the contract of 1852, and that gives the territory granted to them, very clearly.

After M. Carter & Son, Bateman, Dodge, Dorman, and Noyes & Manning, were all running their own businesses on these medicines, they became competitors in the business. When the different sales were made to Dorman, Noyes, Manning & Co., and when Dodge separated from the Carters, it appears that certain divisions of the territory originally owned by Carter & Dodge, were made among them. No contracts of this nature appear in evidence, but something of that kind is testified to by Carter and by Dodge. Soon, however, these territorial divisions were disregarded by them all, and they all sold on each others territory, and wherever they could. Bateman did the same. Nobody set up any exclusive right over anybody, and so the time continued down to 1875, when the complainants bought them all out. None of them at the time of that purchase and sale had any distinctive territorial right, for the boundaries had long been disregarded, and had disappeared by mutual consent and long acquiescence. Not only had they thus disregarded each others territorial rights, but each party in a few years assumed a distinguishing mark for his own manufacture, so as to enable it to be known in the market, from that of his competitors in business. The different Carter firms said on their labels, "Carter's are the only genuine," "Carter's Atwood's Bitters, put up by M. Carter & Son, successors to Moses Atwood, Georgetown, Mass."

L. H. Bateman put his name in red ink on his labels to denote his manufacture, and claimed his to be the only genuine. Noyes & Manning's were known as the "Mystic Atwood's Bitters." Thus we see that the term "Atwood's Bitters" had ceased to designate any particular manufacture, manufacturer, or place of manufacture long before the purchases in 1875, by the complainants. The parties who had originally got the recipe from Moses Atwood gave up the title "Atwood's Bitters," as designating any particular medicine, by common consent, and adopted other titles and trade-marks. The old title

of "Atwood's Bitters" meant nothing. M. Carter & Son used that title under which to put up a spurious article, for several years, while at the same time they were manufacturing what they now call a pure article, under their own private trade-mark.

It appears that Moses Atwood did for some time at or about 1848 to 1850, put up some of the bitters in bottles for sale. They were long, round, smooth bottles like Exhibit F. Part of the time he used white, and part of the time yellow paper for his labels. After the sale to Carter & Dodge, however, they adopted a fluted bottle, as Dodge says, because it was stronger. Thus if any trade-marks consisted in the smooth, round bottle of Atwood, this they voluntarily abandoned, and never resumed. They had certain letters and names blown in the glass of the bottle, which were never used by Moses Atwood. It is uncertain what permanent form of bottle and label Moses Atwood ever used. It is quite certain he never sold any bottle or label to Carter & Dodge, or one which they continued to use, and it is wholly certain that they changed both the bottle and label after they purchased the territory named in the contract of 1852. Bateman changed them also, and Noyes & Manning's manufacture became to be known by a title peculiar to itself. Thus we see if the title "Atwood's Jaundice Bitters," or any other title, ever at any time distinguished the article of manufacture referred to in this case, it had for years before the purchase by the complainants, ceased to do so, being voluntarily abandoned, and never resumed by the persons who had, or may have, bought such title from Atwood. During the time that Bateman and the Carters were making their medicines at Georgetown, Mass., Carter brought a suit in equity in the Supreme court of Massachusetts, for Essex county, to restrain Bateman from using what Carter called the trade-mark belonging to him. In this suit the plaintiff became non-suit, and there the matter ended. All these things transpired between 1861 and 1875. During all these fourteen years, Nathan Wood,

the defendant, was putting up and selling these same Atwood's Bitters, under a formula obtained from Moses F. Atwood, the son of Moses Atwood, and who had learned the business from his father at Georgetown, Mass. This recipe was bought by Mr. Wood from this man, and the defendants' right to put up the article as he had done so long, was never questioned until this suit after the complainants had bought out all the various rights of the Carters, Bateman, Dorman, Dodge, and Noyes & Manning.

Noyes & Manning prepared and put up their medicine at Mystic Bridge, Connecticut, but they said on their labels, "prepared by Moses Atwood, Georgetown, Mass." Dodge put up his at Rowley, Mass., and said the same on his labels. Dorman did the same. Carter & Bateman did the same, until they adopted trade-marks of their own. Even after that Carter & Son used the words "prepared by Moses Atwood, Georgetown, Mass.," on Spurious Bitters, put up by them and sold in the market, the authorship of the article having been kept secret. This is in the main a history of these Atwood's Vegetable Physical Jaundice Bitters, and the bottles and labels in and under which they were put up, and upon which the questions involved in this case are founded. These will now be discussed.

Did Moses Atwood have any trade-mark in 1852, when he made the contract with Carter & Dodge, which could be assigned?

What he sells by the contract of 1852, is thus described by himself.

"Said Carter & Dodge are to have the right to use said At-

wood's name on the labels and circulars, and to manufacture and sell the following medicines."

Then follows the whole list.

In his affidavit he says, page 142,

"I also certify that I, Moses Atwood, did sell all my wright, interest and claim in and to my invention in the said Atwood Vegitable Physical Jaundice Bitters to Carter, Dodge & Co., of Georgetown, Essex County, Mass., with the wright to manufacture and sell, and to use my name in any way to assist them in the lawful use of the Bitters as they may see proper for their own benefit and use, and that i did give to the said Carter, dodge & Co. the original Recipe for said Bitters, in the year 1852, for a valueable consideration in full, paid to me By Carter, Dodge & Co., in the year 1855, all the territory east and south of the States of Illinois and Wisconsent."

There are intimations in the evidence that there were two papers from Moses Atwood to Carter & Dodge, or Carter, Dodge & Co. One of 1852, page 138, and another of 1855 not put in evidence.

But it is abundantly proved that no further right, except an enlargement of territory, was conveyed by the 1855 paper, if ever any such existed. It is not shown that anything new, or a trade-mark, or anything of that kind was sold by that paper.

Concerning these papers from Moses Atwood to Carter &

Dodge, Luther Carter [complainants' witness], can only say as follows:

Page 68.

Int. 42. Were there any papers giving a right to prepare this medicine, and use the bottle, label, etc., as claimed by plaintiff, from Moses Atwood to M. Carter & Son?

Ans. I don't know that there was.

Int. 43. Were there any such from Moses Atwood to M. Carter & Sons, or to you?

Ans. I don't know that there was; none to me certainly.

Int. 44. Do you know whether Benjamin S. Dodge had any paper from Moses Atwood to said Dodge, giving him, personally, the right to put up the medicine, and use the label and bottle now claimed by the plaintiff?

Ans. I do not know that he did have, personally.

Int. 25. How many papers do you think there have been executed from Moses Atwood to your father? Any beside the one of Jan. 1, 1848?

Ans. I don't know of any but that.

Int. 26. Do you know of any papers giving the right to make this medicine and use the alleged trade-mark, as now set up, given by Moses Atwood to your father?

Ans. I do not, not to my father, alone.

Int. 27. Were there any papers, or paper, giving the right to the preparation of the medicine and to the bottle and label, as now set up, given by Moses Atwood to Carter & Dodge?

Ans. There were papers given to Carter & Dodge, giving them the right to manufacture the Bitters, using Moses Atwood's name. I know nothing about the bottle.

Int. 28. Do you know where those papers now are?

Ans. I do not.

Int. 29. When did you last see them?

Ans. I cannot tell.

Int. 30. Did they ever come into your possession?

Ans. I don't know that they ever did.

Int. 31. If they were ever in your hands, to whom did you deliver them?

Ans. If they were ever in my hands, I delivered them to Eli B. Johnson.

without some statement to show that the medicine was after the trade of 1852, really put up by such successors.

Upon this point the cases are clear.

"Whenever the question arises whether any particular name mark, and can be appropriated as property, or rather whether one who adopts such name, etc., is entitled to the protection of the law in its exclusive use . . . . the answer must depend upon the determination of the question, whether such name, etc., is used to designate and does in fact designate the article to which it is affixed as the production of the manufacturer who has adopted it, . . . to furnish to the public the assurance of origin and ownership of the article," etc.

Upton, on Trade-marks, page 98.

"All who use trade-marks indicating that the articles were originally manufactured or owned by others are practicing an imposition on the public. Every assignee and purchaser who has the trade-mark of the original proprietor without indicating that he is the assignee or purchaser, is in this position."

Sherwood v. Andrews, 5 Am. Law, Reg. (N. S.) 588.

Partridge v. Menck, 2 How. App. Cas. 547.

If any celebrity had attached to the particular medicine in question, it had so attached by reason of the name of Atwood.

It could not be by reason of the word "bitters," for that is a common word.

It could not be by virtue of the words "vegetable, physical, jaundice," for they are descriptive words and cannot form a trade-mark or part of the same.

Amoskeag Manuf. Co. v. Spear, 2 Sandf., 599.

Stokes v. Landgraff, 17 Barb., 608.

Binninger v. Wattles, 28 How. Pr., 206.

Therefore the only title or trade-mark which could be attached to these bitters, was the words Atwood's Bitters, or Moses Atwood's Bitters.

Such a trade-mark the assignors of the plaintiffs could not lawfully use without adding thereto the statement that they were the successors of Moses Atwood, Georgetown, Mass., and as such were making the Bitters.

Now how do the complainants allege that they have marked and stamped this medicine?

See page 1 of the case.

Here the allegation of the bill is that they have prepared these bitters and asserted on the labels that they were made by Moses Atwood.

Not only this, but while representing them as made at Georgetown, Mass., where they were originally made, and where they acquired their reputation, they are now admitted to be put up in New York City.

Henry [complainants' wit.] page 33.

Int. Did you ever know of said Atwood's Bitters being made at any other places besides Georgetown and Mystic Bridge?

Ans. No; except the Manhattan Co., who have made them at New York.

"Suppose a firm of A. B. and Co. to have been clothiers in Wiltshire for fifty years, and that broadcloth marked thus: "A.

B. & Co., makers, Wilts," has obtained a great reputation in the market, and that A. B. & Co. are discontinuing business, sell and transfer the right to use their name and mark to a firm of C. D. & Co., who are clothiers in Yorkshire, would this latter be protected in a court of equity in their claim to the exclusive right to use the name and mark of A. B. & Co.? I am of the opinion that no such protection could be given."

L. C. & Co. v. Am. L. Co., 11 Jur., 513. Am. Trade-mark Cases, page 699 [Cox].

Palmer v. Harris, 60 Penn., 156.

By all complainants' testimony it is admitted that nothing passed as a trade-mark, but Atwood's name.

Carter [page 68, Int. 27, before quoted], so states.

Dodge [page 95, before quoted] testifies to the same.

These are both complainants' witnesses.

For twenty years before the assignment in 1875 to the Manhattan Med. Co., Carter & Dodge, Carter, Dodge & Co., M. Carter & Sons, and M. Carter & Son had carried on the making of these bitters at Georgetown, Mass., also Dodge, at Rowley, Mass., for a number of years, and Noyes & Manning, at Mystic, Conn., all using a label exactly like the one on Exhibit A, and seen in the bill, page 1, and all representing that the bitters were prepared by Moses Atwood, Georgetown, Mass. When it is in evidence that Atwood sold out to Carter & Dodge, in 1855, and went to the State of Iowa, where he has ever since lived.

Now all the sales of these bitters made since 1852 have been made to the public upon the false representation that they were "manufactured by Moses Atwood," with some exceptions to be named hereafter in connection with another point.

I apply to this and the continued sales of the bitters by the present complainants, the rule that "assignees of trade-marks have no special privileges of sailing under false colors, and if they will persist in so doing, prudence would dictate that they give courts of equity a wide birth."

Sherwood v. Andrews—before cited.

Thus Moses Atwood could not assign to the assignors of the complainants what they claim to have owned, nor could said "successors and assigns" assign the same to the present complainants.

THE COMPLAINANTS CANNOT CLAIM THE FORM OF THE BOTTLE, BECAUSE THEIR ASSIGNORS CHANGED IT FROM THAT WHICH MOSES ATWOOD USED.

This appears from **Luther F. Carter,** page 55.

Int. 33. What form of bottle and kind of label did Carter & Dodge use with said Bitters?

Ans. They used, to start with, the old-fashioned, round, plain, straight bottle, the same as I have described Atwood used, and afterward the eight ounce bottle, fluted like Exhibit "A." The label was similar to what I have described before on Exhibit "A."

Int. 34. What kind of bottle and label did Carter, Dodge & Co. use?

Ans. The eight ounce, fluted bottle—same as Exhibit "A," and same label.

Dodge, page 94.

Cross-Int. 6. The bottle used by Moses Atwood was like Exhibit F, was it not?

Ans. It was.

Cross-Int. 7. The change to the fluted bottle was made by you and Carter, was it not?
Ans. It was.

Cross-Int. 8. How long after you began business was this change made?
Ans. In about three years.

Cross-Int. 9. Did you, or not, then discontinue, in time, the use of the bottle shaped like Exhibit F.
Ans. We did.

Cross-Int. 10. Why was the change made by you?
Ans. We wanted a better bottle — stronger bottle.

The words, "Moses Atwood, Georgetown, Mass.," blown in the glass of the bottle, were also an alteration by Carter & Dodge.

Thus the fluted bottle with the words blown in the glass were no part of Moses Atwood's trade-mark if he had any.

So that all the assignors of the complainants acquired from Moses Atwood was the right to use his name, and this in 1875 they assigned to the complainants.

There is a perfectly plain and frequently recognized distinction between a firm name and a trade-mark. A firm may be rightfully continued under the same title, although all the original members, whose names composed the original title have died.

But a trade-mark upon an article of manufacture is to, and must, denote the origin and manufacture of the article. It is

upon this that the public relies when purchasing. The reputation of the manufacturer is what gives assurance of the quality of the goods. Therefore no purchaser of the secret of that manufacture, can rightfully use the name of the original proprietor without at the same time giving notice on the label or trade-mark, that he is a successor of the originator whose name constitutes part, and the essential part of the trade-mark.

Leather Cloth Company, v. Am. Leather Cloth Company, 11 Jur. N. S., 513. [Cox Am. Trade-mark Cases, 699.]

WHAT WAS THE EXACT NATURE AND EXTENT OF THE RIGHT TRANSFERRED BY MOSES ATWOOD TO CARTER & DODGE, IN 1852?

This is evidenced first by the contract on page 139, and second by certain oral testimony to the admissibility due objection was made.

The contract itself upon this subject, specifies as follows:

The ground on which said Carter & Dodge are to sell and manufacture for sale, as aforesaid, the said medicines, is agreed to be the following, viz.:—"The State of Massachusetts, except the places of Lowell, Dracut, Methuen, Lawrence, North Parish of Andover, in neighborhood of Sutton Mills, Bradford, Haverhill, Amesbury, all of Salisbury except the lower village, and said Atwood's right to sell at his place in Georgetown; Rhode Island, Connecticut, New York, except the Counties of Warren, Essex, Clinton, Franklin, St. Lawrence, Hamilton, Fulton, and that part of Herkimer lying north of the Erie Canal; New Jersey, Pennsylvania, Delaware, Maryland; the towns of Seabrook, Hampton, Rye, Greenland, Portsmouth,

Salmon Falls and Wakefield, in the State of New Hampshire; the towns of Kittery, South Berwick and Lebanon, in the State of Maine; and the Counties of Bennington, Windham, Windsor, Rutland and Addison, except the towns of Granville, Lincoln, Starksborough, Monckton and Fereilsburg, in the State of Vermont."

On page 55, Int. 29, evidence is attempted to be introduced as to the contents of another supposed transfer from Atwood to Carter & Dodge, in 1855. This, it is said, included all the territory of the United States, except "the West!"

This is not definite to say the least.

On page 70, same witness, Int. 71, it is admitted that Maine and part of New Hampshire, were excepted from the grant to Carter & Dodge.

This territory was sold to two other Atwoods, and they were allowed to sell Bitters as Atwood's Bitters, but they were to use the initials L. F. But they were the same Atwood's Bitters, and had a yellow label, the same directions, etc., etc., as Moses Atwood's.

Thus we perceive that the right obtained by Carter & Dodge was a limited territorial one, and did not include the State of Maine, or New Hampshire.

The first requisite of an exclusive property in a trade-mark, is the exclusive right to manufacture or sell the specific article to which it applies.

Upton on Trade-marks, page 23.

Canham v. Jones, 2 Ves. & Beames, 218.

It is plain that no such right exists in this case, for the grantor, Moses Atwood, reserved certain territory to himself, excepted Maine [where the respondents do business], and New Hampshire.

Now under these circumstances, it is plain that no exclusive right to the use of the words Atwood's Bitters, could be claimed by Carter & Dodge, and consequently none could be assigned to the complainants.

Not having the exclusive right to the medicine, neither the complainants nor their assignors can have an exclusive right to the name of the same.

There is no such thing as the sale of a trade-mark, or indeed the existence of one in the abstract, unconnected with a specific property or article of merchandise to which it is affixed.

Upton on Trade-Marks, page 22.

Leather Cloth Co. v. Am. L. Cloth Co. American Trade-Mark Cases [Cox], 698.

Thus the right to the trade-mark of an article is dependent upon and follows the nature and extent of the ownership of such article.

The allegation of the bill of the exclusive ownership of the alleged trade-mark is therefore not sustained.

Certain exceptions it will be seen are made in the contract of 1852, in the States of Massachusetts and New York. Nothing is shown to prove that those exceptions were ever withdrawn.

Certain reservations were also made to one Albee, and two

persons by the name of French, who had concurrent rights with Carter & Dodge, in their territory.

Case page 140.

No removal of this exception to Carter & Dodge's exclusive right, even on the territory granted them is shown.

One Bingham, it appears, was then a partner of Moses Atwood, and no transfer of his right is shown on this record.

BUT THE RIGHTS OF CERTAIN OF THE ASSIGNORS OF THE COMPLAINANTS, IF ANY, WERE FORFEITED LONG BEFORE THE ATTEMPTED TRANSFER.

1 By the use of the alleged trade-mark as a means of misrepresentation and deception upon the public, in the sale of a spurious article under the same.

2 By laches, and long acquiesence in the use of the alleged trade-mark by the respondents and by others.

3 By a disregard, among themselves of their several allotted rights under the said trade-mark, and of the limitations put upon the same, and the grant of the same by Moses Atwood.

4 By the voluntary relinquishment of the bottle, label, etc., as used by Moses Atwood, and conveyed to Carter & Dodge, in 1852, and the adoption of new trade-marks of their own invention.

1 THE USE OF THE LABEL, BOTTLE, AND THE WORDS "ATWOOD'S BITTERS," AND PREPARED BY MOSES ATWOOD, GEORGETOWN, MASS., AS A MEANS OF MISREPRESENTATION AND DECEIT.

The assignors of the complainants could not convey any greater or better rights than they themselves had at the time of the conveyance.

If they once had rights, or had derived rights from former transferrors, but had forfeited them by using the trade-mark, as a means of deception, then, when they attempted to convey a trade-mark to the complainants, they had none such to sell. They had lost it by their own misdoings.

Upon this subject the evidence is full.

The assignor of the complainants so far as Carter's interest in the Carter & Dodge firm was concerned, was Luther F. Carter, complainants' witness.

For a period of five years previous to the sale to the complainants this person compounded and sold what he calls the genuine bitters under a label of his own invention, the form of which is seen on pages 59, 60, of the record.

On this it will be seen that the character of the label is changed. First, it states "Carter's are the only genuine." Then at the bottom we find the words, "None others are genuine." It was a fluted bottle and had the letters blown in the glass.

While thus having changed the original Moses Atwood label and bottle, he also confesses to putting up an inferior or "extended" article, and selling that under the label of the form set out in the bill, i.e. what the complainants allege to be the original Moses Atwood label.

The witness account of this is found in the following extract from his testimony:

Page 66.

Int. 13. Have you yourself always put up or compounded these Bitters in the same way and under the same recipe or formula in all particulars?

Ans. I have always made them of the same material but not of the same strength.

Int. 14. Then you have made changes in the relative proportions of ingredients, have you?

Ans. I would say on this particular brand or label I have.

[This means the original Moses Atwood label.]

Int. 15. And have the Bitters thus varied in strength been put up in the same way as to form of bottle, label, color of label, etc.?

Ans. They have.

Int. 16. How many gross of the weaker Bitters have you thus put up and sold, approximately, if you cannot state accurately?

Ans. It covered a space of five years, I think: perhaps from 150 to 200 gross a year.

Int. 17. Was the plaintiff informed of this?

Ans. He was not through me, or to my knowledge. They did know it before the sale to them.

Here is notice to the complainants.

Again, same witness, page 70:

Int. 75. How long have you used the label of the character such as is annexed to your 86th direct answer?

Ans. From about 1870 to 1875.

Int. 76. Have you, during that time, used any other kind on the bottles of this medicine?

Ans. I have.

Int. 77. How many kinds of labels have you during this time used on the bottles of this medicine?

Ans. I have used but the two kinds, one with the heading, and the other the original label.

Int. 78. Of which have you used the most since 1870?

Ans. I think the original label.

Int. 79. Did you put up and sell the same medicine under both labels, compounded and made in the same way?

Ans. I did, but not in the same strength.

Int. 80. Under which label did you put up the medicine made in all particulars according to the original Atwood formula?

Ans. The label with the Carter heading.

Int. 81. Were the materials of which you made the Bitters put up under the original Atwood label, as good in every respect as those from which you made the Carter Bitters?

Ans. It was as far as I know.

Int. 82. Did the Bitters thus put up sell for as high a price as the Carter Bitters?

Ans. It did not at wholesale.

Again, same witness, page 73:

Int. 118. Why was the label attached to your 86th answer, employed and used?

Ans. It was used to designate that particular brand, as other makers claimed theirs was the only genuine article.

Int. 119. And the genuine article was put up under that label, was it not?

Ans. It was.

Int. 120. And the $16 Bitters were put up by you under the original Atwood label, were they not?

Ans. They were.

Again, same witness, page 74:

Int. 126. To what extent did M. Carter & Sons make and sell these Bitters per year?

Ans. They sold from 300 to 400 gross per year.

Int. 127. How much under the Carter label and how much under the original Atwood label?

Ans. The sale was about equally divided.

Int. 128. How was it with M. Carter & Son up to the year before you sold to the plaintiff?

Ans. There was more of the $16 article sold; wholesale dealers like them the best to buy.

I will now endeavor to trace the real character of these weaker bitters in the hands of dealers, and according to the account of Carter's own agents.

The witness admits that these spurious bitters, put up as they were, under the original Atwood label calculated to deceive the purchaser and the public.

Carter, page 73:

Int. 121. Do you think that the bottle and label, Exhibit B, would deceive a dealer acquainted with the bottle and label, Exhibit A, into the belief that, when buying B, he was buying A?

Ans. I do not think it would if he was acquainted with the article.

Int. 122. You do think, do you not, that a person unacquainted with the article A, might be deceived by B?

Ans. I do.

Int. 123. Do you think the inexperienced purchaser would be deceived, if he took pains to read the words, "Prepared by Nathan Wood, sole proprietor, Portland, Me.," on the label B?

Ans. I think he would.

Int. 124. Do you, or not, think that the inexperienced purchaser would be deceived into the belief that he was buying the genuine Atwood's Bitters, such as put up by you, under the label attached to your 86th answer, when a bottle of the $16 Bitters, with the original Atwood label on it, was offered him?

[Objected to.]

Ans. I think he would.

Richardson, page 189:

Int. 10. Of whom did your firm purchase the articles substantially like "A" and "C"?

Ans. Charles E. French, Drug Broker, Boston.

Int. 11. Did your firm deal in an article where there was a label employed like the one now shown you, attached to the 86th answer of the deposition of Luther F. Carter?

Ans. They did.

Int. 12. What was the customary price per gross of the article having on it such a label?

Ans. $27 per gross.

Int. 13. Will you state how that article was esteemed in the trade, and whether it was considered a genuine article or not?

Ans. It was esteemed as the genuine Atwood's Bitters.

Int. 14. What was the price per gross of the article which you bought and dealt in, having the label like "Exhibit A"?

Ans. $16.50 per gross.

Int. 15. How was that article known and esteemed in the trade; as genuine or otherwise?

Ans. It was considered an imitation Bitters.

Int. 16. Was, or not, its character well understood by you and in the trade?

Ans. It was.

Int. 17. For how many years was this imitation Bitter put on to the market under the label substantially like Exhibit "A"?

Ans. I should say six or seven years.

Int. 18. Did you buy both of these kinds from French, the drug broker?

Ans. We did not.

Int. 19. Which did you buy of him?

Ans. The imitation.

Int. 20. If it was generally understood in the trade who put up the imitation Bitters, will you state by whom it was understood to be put up?

Ans. Moses Carter & Son, of Georgetown.

Int. 21. Will you state what experience you have had of the imitation article, like Exhibit "A," as to its remaining in a sound condition while in your hands? State fully.

Ans. We, during this period since we have handled it, at different times we have had it burst, become sour from fermentation, rendering it unfit for sale, so that we had to have it returned.

Int. 22. What effect did the fermentation and souring have, if any, on the corks of the bottles?

Ans. Caused them to be blown out.

Int. 23. To whom did you return the Bitters under such circumstances?

Ans. We would notify Mr. French, of whom we purchased them, and he would see that they were exchanged for better.

Int. 24. Did any fermentation and bursting ever take place with what you understood to be the genuine article?

Ans. Not to my knowledge.

Int. 25. Would what you call the imitation article keep when exposed to the rays of the sun for any considerable time?

Ans. It would not, in my opinion.

Int. 26. Running over the six or seven years of which you have spoken, can you give some idea of the frequency of the spoiling of the imitation Bitters, as you have described, by fermentation?

Ans. No, I can't tell how many times, but I know it has happened frequently during that period.

Int. 27. Of which should you judge, of your knowledge, was the largest amount put into the market of these two, the imitation and the genuine brand?

Ans. The imitation.

Int. 28. By what title were what you call the genuine article bought and sold in the market?

Ans. Carter's Atwood's Bitters.

Page 197.

Int. 1. State your name, age, residence and business.

Ans. Frank B. Webster; age, 47; residence, Boston; business, jobbing in patent business.

Int. 2. With what firm are you?

Ans. George C. Goodwin & Co.

Int. 3. Are they not agents of the Manhattan Medicine Co., for the sale of an article substantially like Exhibit "A"?

Ans. We buy and sell it; that is all the agents we are.

Int. 4. Has your firm ever bought of M. Carter & Son, Georgetown, Mass. an article substantially like Exhibit "A," with the same label, for about $16 per gross?

Ans. We have.

Int. 5. Have you bought them of any broker in Boston; if so, whom?

Ans. We have, of Charles E. French.

Int. 6. Over how many years have your purchases from both extended.

Ans. Bought of Mr. Carter some fifteen years, and of French two or three years.

Int. 7. Was, or not, this $16 article generally known and sold in the trade?
Ans. I think it was.

Int. 8. State whether you have had any of those returned to you for unsoundness?
Ans. I think in two or three cases we have had them returned. They said they were sour.

Int. 9. State if Carter also put up another form, and state as to the price, and the difference, if any, in the label.
Ans. He put up same style Bitters, I should say, aside from putting his name upon the label. Those were $27 per gross; label like one attached to Luther F. Carter's 86th answer in his deposition.

Int. 10. When these cheaper Bitters were first put upon the market, was it known by whom they were prepared?
Ans. It might have been known by somebody, but not by our firm.

Int. 11. Did you try to find out?
Ans. We made some inquiries.

Int. 12. Could you ascertain?
Ans. We could not for a few years.

Int. 13. State what, if anything, Carter admitted to you about the putting up of the Bitters at a later time, when you were buying this kind of him, Carter?
Ans. He admitted he would put up a cheaper Bitters than the $27 Bitters, which he would sell us for same price that we had been buying of the broker.

Int. 14. Did he or not admit that the Bitters which had been for a few ears sold in the market, of the manufacture of which you were ignorant, were put up by him or his firm?
Ans. Don't know as he admitted it in those words, but I got the impression that he did from what he said.

Page 200.

Charles E. French, the broker, thus testifies concerning these imitations:

Int. 10. At what price per gross did you sell those Bitters?

Ans. At various prices. As near as I can remember from $16 to $22 per gross.

Int. 11. By whom were these Bitters prepared or put up?

Ans. I have seen a bill of one lot of Bitters from M. Carter & Son to said firm or their successors.

Int. 13. You sold some, did you not, to Rust Brothers & Bird, of Boston?

Ans. I did.

Int. 24. Did or not the labels of the bottles, or both, have on them the words Georgetown, Mass.?

Ans. I think a part, if not all, did.

Titcomb, page 212.

Int. 4. How many kinds of labels were used on the bottles containing the Bitters put up by M. Carter & Sons, or Carter's sons?

Ans. There were two kinds of labels used on the bottles containing the Bitters put up by M. Carter & Son.

Int. 5. Did or not the Carters have one label which was used exclusively by them; if so, describe it?

Ans. They did have one label which was used exclusively by them. It was a yellow paper label, printed with black ink. On the top of the label were printed the words "Carter's are the only genuine," and below the directions were printed the words "Manufactured by M. Carter & Son (successors to Moses Atwood), Georgetown, Mass." At the bottom of the label were printed the words, "Caution — Observe that our name is blown in the bottle, and also on the Revenue stamp over the cork. None others are genuine." The label also bore the words, "Atwood's Vegetable Physical Jaundice Bitters."

Int. 6. State what you know, if anything, concerning Bitters put up at Carter's place under the different kinds of labels, if you state that such different kinds of labels were used.

Ans. There were two kinds of Bitters put up at Carter's place under the two kinds of labels which I have stated that they used. One kind, under the label described in my last answer, was the Genuine Atwood's Vegetable Physical Jaundice Bitters, and was sold in the market at wholesale at twenty-seven dollars per gross. The other kind was an inferior article, an imitation of the genuine, and was sold in the market at wholesale at about fifteen dollars per gross. This latter kind bore the old-fashioned original label of Atwood's Bitters, with the "e" left out in the word "the" preceding the words "United States." I never sold any but the first kind, and always denounced as imitations all others wherever I found them. Such were my instructions. Carter's traveling agents never sold any but the genuine. The imitation was disposed of by Carter alone. The imitation article would not keep, but turned sour, and was sometimes returned. In most instances the two kinds were retailed at the same price; but where both kinds were known, the genuine brought a higher price.

In this testimony there are proved two things both equally subversive of the right of the complainants and their assignor to any exclusive right to property in a trade-mark.

1 The old label and designation was abandoned, the one which had for fifteen years designated this class of goods.

2 A new one was adopted, viz.: by one which said that Carter's are the only genuine.

3 Under the original label a deceit was practiced upon the public. While Carter's agents were only sent out with his new label and genuine manufacture, great quantities were secretly by him put upon the market, of an article which would not keep, which fermented and soured, and which could not stand exposure to the sun. These were often returned to dealers on account of their imperfection.

The question upon this point is, could Carter himself have maintained his right to the exclusive use of a trade-mark which he had prostituted to such uses? Had he not forfeited any right of property in it by these practices?

Could he come into a court of equity with clean hands and ask for relief after that?

He had not only dissevered the Moses Atwood label from the goods to which it was applied by him, but he had affixed it to a counterfeit, calculated to deceive the public and destroy the reputation of the very goods upon which, as complainants allege, it was affixed as a trade-mark by Atwood.

A trade-mark, as has been shown, is only recognized by a Court of Equity when connected with some article of merchandise to which the skill and enterprise of the manufacturer or seller has given a reputation. It is then, and then only, property. It is a source of profit to the proprietor, and a guaranty to the public of the good quality of the article to which it is affixed.

But if used as a means of misrepresentation or deceit, it is property no longer, and he who uses it for such purpose can claim no property rights under it.

Upon this point the authorities are numerous and clear.

Hobbs v. Francais, 19 How. Pr. Rep. 567.

Phalon v. Wright, Am. Trade-Mark Cases. [Cox] page 311.

Pidding v. How. Cox Am. Trade-Mark Cases, 640.

Perry v. Truefitt, 6 Beav. 66. Upton on Trade-Marks, 30–31.

"When a person seeks by representations which are untrue to mislead the public into the belief that his commodities . . .

are compounded or produced in a manner not in accordance with the truth . . . he places himself beyond the pale of the protection of the law—and acquiring no exclusive right in the trade-mark he uses, is entitled to no relief against any one who may see fit to appropriate it."

Upton, *ut supra*, and cases cited.

The misrepresentation in Carter's case was of the most mischievous kind. It consisted in using the Moses Atwood label on a spurious medicine.

Thus all rights claimed to have been derived from Carter & Sons were forfeited and destroyed by their acts.

THE ALLEGED RIGHTS WERE FORFEITED BY LACHES AND LONG ACQUIESENCE ON THE PART OF THE COMPLAINANTS, IN THE USE OF THE ALLEGED TRADE-MARK, BY THESE RESPONDENTS AND BY OTHERS.

In 1852 Carter & Dodge made the contract seen on page 138, and as it is endeavored to be shown, an earlier one in 1851, with Moses Atwood.

Carter & Dodge carried on the business of putting up these bitters until 1858, Atwood having gone to Iowa in 1855. Then (in 1858) the firm became Carter, Dodge & Co., by the admission into the same of C. L. Carter, a son of Moses Carter.

Three years later [i.e. in 1861], Carter, Dodge & Co. dissolved, Dodge went out to Rowley, and continued to put up the bitters, with the same label, for some years. Then he sold a right to Dorman, who manufactured at Georgetown, Mass. He also sold certain other right to Noyes & Manning, who manufactured at Mystic, Conn.

After the dissolution of Carter, Dodge & Co., M. Carter & Son carried on the same business concurrently with Dodge, but with no common interest. M. Carter & Son continued in business until about in 1866. Then came the firm of M. Carter & Sons, which continued until 1871, when Luther F. Carter, complainants' witness, and one of complainants' assignors, took the business and conducted it until April, 1875, when, or soon after, the sale occurred to the complainants.

All this time from the year 1855 to 1871, in the same village of Georgetown, L. H. Bateman carried on the business of compounding these bitters in competition with the Carters & Dodge, and when he died in 1871, his son continued the same until he sold to the complainants.

All these used the label and bottle like Ex. A.

The record shows no grant or license of any kind from Atwood to Bateman. It may therefore be assumed that there was none.

To prove this the complainants put in the affidavit of Moses Atwood himself, procured in February 1875, by Luther F. Carter, probably as a necessary and required preliminary to his sale to the complainants [page 78, Int. 162]. This affidavit denies that Bateman ever had any right from Atwood.

Page 142.

We may therefore assume that in 1855, Bateman began putting up these bitters, and using a bottle and label like Ex. A, in defiance of any assumed claim of the Carters.

In 1857 Carter & Dodge brought a bill in equity to restrain Bateman, and a suit at law for damages for the use by him of the bottle and label like Ex. A.

The rest of the story may best be told by evidence introduced by the complainants themselves. It is contained in a circular issued by Bateman after the termination of those suits and is not contradicted by Carter, during whose deposition it is introduced.

It is as follows:—So far as pertinent to the point under discussion.

Case, pp. 60, 61.

"Certain other parties, under the various names of Carter, Dodge & Co.; M. Carter & Sons; M. Carter & Son, have manufactured and sold what they claimed to be the genuine Atwood's Bitters; sometimes under the name of Atwood's Bitters, and sometimes by the name of Carter's Atwood's Bitters. These parties, or some of them, have at times claimed and published, that they had the exclusive right to manufacture and sell Atwood's Bitters; that the name Atwood's Bitters, as a trade-mark, was their exclusive property, and that Bateman had no right to use Atwood's name in the manufacture and sale of the Bitters, and was not authorized to manufacture and sell in any way. And they printed and caused to be circulated a card to the public, dated August 12, 1857, purporting to be signed by Moses Atwood, cautioning the public against buying medicines manufactured by Bateman, as he had never imparted to him the knowledge of their manufacture."

"To enforce their claims, and to restrain Bateman from the manufacture and sale of Atwood's Bitters, and the use of Atwood's name, M. Carter, Dodge & Co. brought a Bill in Equity in the Supreme Judicial Court for Essex County, in the year

1857, and also a suit at law for the recovery of damages in the same court, upon the same grounds."

"On the 19th day of May, 1857, their prayer for an injunction after a hearing by the court was refused, thereby sustaining the right of Bateman to make and sell the genuine Atwood's Bitters, and to use Atwood's name as his trade-mark."

"Carter, Dodge & Co. became non-suit in their bill in equity June 2, 1860, paying Bateman costs of suit, and abandoned their suit at law November 12, 1860, as appears by the records of the court. And it is a fact not to be forgotten, that during all the time these legal proceedings were in progress, Moses Atwood was living in Iowa, and they neither produced him nor his deposition, to substantiate their claims on his oath, or to deny Bateman's, or any of the foregoing facts."

Now from this it appears that a motion for injunction was denied Carter & Dodge on a full hearing, and that in about three years after they suffered a non-suit.

Certainly after this they could claim no exclusive right to the label or bottle, Ex. A, for after this judgment of the Sup. Jud. Court, Bateman kept on until he died, in the business. No further efforts were made by the Carters to stop him.

There was nothing concurrent or harmonious in these two rights [or alleged rights] of Bateman & Carter. Therefore the only conclusion that can be made is, that the Court must have decided that the Carters had no exclusive right.

This is enforced by the fact that Moses Atwood says in his affidavit that Bateman had no right from him. Therefore

Bateman was in opposition to the claims of the Carters, and successfully so.

Carter & Dodge both say they never acknowledged Bateman's claim of right.

Carter, page 83.

Dodge, page 95, Ints. 22, 23.

From this we can only conclude that Bateman disputed their right to the bottle and label, Ex. A, and maintained his position in the Courts.

From 1861 to 1875, after this Bateman continued to use the bottle and label, his right to which, the assignors of the complainants never conceded, but simply acquiesced in.

Carter, page 81, Int. 171.

Now in 1875, the complainants step in and buy up both these opposing rights, Bateman's and the Carters'.

This might do if it were to quiet title to a piece of real estate. But with respect to this class of property, trade-marks, the law is different.

A man can buy up all the conflicting titles to real estate, and so obtain a valid ownership. But in the case of property in trade-marks the adverse claim of any one, if successfully maintained, as Bateman's was, destroys that exclusiveness which is the essential quality to the preventing of others from using the same mark on the same goods.

It does not benefit the complainants any that they have bought out Bateman, who for fifteen years successfully proved

that the Carters and Dodge had no exclusive right in the property of the bitters or the marks used in connection with them. It only serves to prove more clearly that there was no exclusive privilege or trade-mark that could be purchased.

The Carters and Dodge had acquiesced so long in this usurpation of Bateman's that they were estopped from setting up a right superior to his, and this being so, their exclusive privilege was relinquished and gone.

Such acquiesence destroys the essential quality and character of a trade-mark, no attempt ever having been made by Carter or Dodge, after the suit in Equity, to resume the exclusive right.

Where long acquiesence in the usurpations of another party is proved still an injunction will be granted when the party resumes his original right. Here no resumption was pretended, but continued acquiesence is shown from the fact that Bateman's right was bought by the complainants, thereby acknowledging it.

McLean v. Fleming, U. S. Sup. Court, Oct. T., 1877.

Amoskeag Co. v. Garner, 55 Barb., 151.

Beard v. Turner, 13 L. T. R., 747.

This case was different from those of acquiesence usually found in the reports. Simple acquiesence may affect the question of costs or damages, but will not, on a resumption by the person originally entitled to the trade-mark, work any forfeiture.

Here, however, was an ineffectual attempt to enforce the rights of the assignors of the complainants, and a judgment of a Court of Equity adverse to them, and a dismissal of an action at law, and then an acquiesence of nearly fifteen years, and no attempt either by the complainants or their assignors to resume the right.

This was a denial of the exclusive right of the Carters to the use of the term Atwood's Bitters.

Not only was there this acquiesence in the adverse use by Bateman of the words label and bottle, but there was also knowledge of the use of the same by the respondents themselves, and acquiesence in that also. From the time that knowledge of the use of the term Atwood's Bitters, by Wood, was brought to the knowledge of the Carters, no action was taken, no adverse claim was made.

The fact of this knowledge is shown by the following extracts from the evidence:

John T. Wood, page 147:

Int. 20. Did you, previous to the visit of Johnson to your store which you have described, ever hear of, or did you ever receive notice of, any claim by any of the manufacturers, to the exclusive right to the use of a twelve-sided bottle, having thereon, or on the label thereof, the words, "Atwood's Vegetable Physical Jaundice Bitters"?

Ans. None of them ever made any objection. Mr. Carter, one of the firm of Carter & Son, was in our store four or five years ago. He made no objection. He knew what we were selling — must have known. He said, at that time, that if Moses Atwood had kept the right to himself instead of scattering it all over the country, it would have been valuable.

Same witness, page 160:

Int. 155. In your answer to the 20th Int., you say that Mr. Carter, one of the firm of Carter & Sons, four or five years ago. Which Carter was it?

Ans. I couldn't tell you. He gave us his card. He was one of the young Carters. I should judge at that time that he was thirty-five years old. He

was a short man I think, middle sized man, except he was pretty stout — might have weighed 175 pounds. I should say about five feet four inches, say.

Int. 156. Were you then using the bottle which you say you first used for the Bitters?

Ans. We were using the smooth, long, round bottle, and the twelve-square bottle with the lettering [referring to "Exhibit A, July 14, 1875"].

Int. 157. Did you show the Carter who you say visited your store five or six years ago the bottles you were then using for your Atwood's Bitters?

Ans. The bottles set on the shelf in the store — both kinds. I don't remember that I called his attention to them particularly.

Int. 158. Who was present in the store at the time you say Carter called?

Ans. My father was in the store. I think he saw him first.

Int. 159. Can you fix the time of this visit any more definitely than to say it was four or five years ago?

Ans. I haven't any means of fixing the time. He said he was going to the provinces. He left his card.

Same witness, page 163:

Int. 183. When the Mr. Carter of whom you have spoken visited your store, what, if anything, did he say about the manufacture of these Bitters having become known or common?

Ans. I remember of asking him who the manufacturers [were]. I remember asking who L. F. Atwood was. He said he was a brother of Moses. I had thought him the son. I think he had some conversation with my father about Atwood's Bitters, but I don't remember all the conversation.

Int. 184. When he visited your store were the Bitters up in the twelve-sided bottles to be seen on the shelves?

Ans. They were — about the middle of the store, on a low shelf. About the same place they were when Johnson came.

Int. 185. Was there any difference in the places where the two kinds of Bitters were placed, as to the ease with which they could be seen by a person visiting the store?

Ans. The round bottles were in wooden and paste-board boxes of this kind [referring to "Exhibit 3, G. E. B."], and piled up to the shelf upon which these twelve-square sat, these latter being paper packages. They set close by each other.

Nathan Wood, page 173:

Int. 32. Do you remember of Carter, of Georgetown, Mass., visiting your store; if so, when was it?

Ans. He did visit my store, some — well, four or five years ago.

Int. 33. Do you know what the name of that person is?

Ans. Luther F. Carter.

Int. 34. At the time of his visit, were there in your store articles like "Exhibit A and B"?

Ans. I think we had both of them at the time.

Int. 35. Did he see them?

Ans. I couldn't say that he did or not.

Int. 37. Did he say anything at that time concerning your preparation of this article, and was he aware of the same?

Ans. He did, and was aware that we manufactured it?

Int. 38. Did said Carter say at that time to you that you were so preparing and selling this article against his own rights?

Ans. No.

Int. 39. Did he make any claim of that character?

Ans. No, not in the least.

Luther F. Carter, complainants' assignor, page 72:

Int. 100. How long have you known, if at all, of the use of the bottle like Exhibit B, by the defendant?

Ans. I have frequently seen them in the market the last few years.

Int. 101. For about how many years, as nearly as you can get at it?
Ans. Eight or ten years.

Same witness, page 79:

Int. 168. If, as you state, you heard several years ago that Nathan Wood, the defendant, was putting up a Bitters, such as Exhibit B, why did you not sue him for doing it at the time?
Ans. Because the old firms had not been successful from stopping Bateman from using the trade-mark, and as Wood did not interfere with our trade very much, and because there was no union among the owners, that there was nothing done about it.

Int. 169. Was or not the matter often spoken of, that is, the stopping of Wood, as a thing which the several joint owners of the trade-marks might do?
Ans. It was spoken of and talked over somewhat?

B. S. Dodge, complainants' assignor, page 87:

Cross-Int. 87. How long has Nathan Wood, to your knowledge, been selling Atwood's Bitters?
Ans. I do not know. I have heard that he was selling them, but I could not say when nor how long.

Cross-Int. 88. Did you know that he was selling them when you were putting them up at Rowley?
Ans. I did not.

Cross-Int. 89. Did you know of it when you sold to Dorman or Manning?
Ans. I could not say when I first did hear of it.

Cross-Int. 90. Has it not been known to you for several years?
Ans. Yes.

Thus for a period of four to ten years, the assignors of the complainants had knowledge of the putting up of these bitters, with the bottle and label by the respondent.

The reason given for not asserting any right against him is very significant, first, because Atwood had "scattered" his recipe all around the country, and second, because not having had good luck against Bateman, they concluded not to try any more.

Under these circumstances, could these assignors, or the complainants, any more revoke Wood's right than they could Bateman's?

They bought Bateman out.

They tried to buy out Wood, and could not.

Nathan Wood, page 175:

Int. 52. State what, if any, offers said Johnson made to you concerning the sale of your right in these Bitters?

Ans. He said if we would give up the twelve-square bottle he would buy the mould.

Int. 53. What reply did you make?

Ans. I told him we would take it into consideration.

John T. Wood, page 145:

Ans. He made two calls. He said his object was to get all the manufacturers of Atwood's Jaundice Bitters to enter the Manhattan Medicine Com-

pany, and wished us to go in with the rest; putting in our right to the Atwood's Bitters at three thousand dollars, and they would issue stock to us to that amount.

3 THE RIGHT TO THE EXCLUSIVE USE OF THE BOTTLE AND LABEL EX. A, WAS FORFEITED BY THE ASSIGNORS OF THE COMPLAINANTS, BEFORE THE ASSIGNMENT, BY A DIVISION OF THE RIGHT AMONG THEMSELVES, BY A DISREGARD BY ALL OF THEM OF THE TERRITORIAL LIMITS ASSIGNED TO EACH IN THE DIVISION, AND OF THE LIMITS SET TO ALL OF THEIR UNITED TERRITORIAL RIGHTS, BY MOSES ATWOOD, THE ORIGINAL GRANTOR.

It will be borne in mind that after Carter & Dodge dissolved in 1858, Dodge took a portion of their firm territorial right, and Carter a part. Dodge went out to Rowley, and manufactured there. Then he sold a right to Dorman, at Georgetown, Mass. The rest of his territory he sold to Noyes & Manning, at Mystic bridge, Connecticut.

Now after a little time, all of these manufacturers wholly disregarded each other's rights, and for many years, and up to the time of the sale to the complainants, were selling in competition on each other's territory, and all of them transgressing the limits fixed to their combined rights by Moses Atwood, when he granted certain rights to Carter & Dodge in 1852.

The evidence on this point is from complainants' chief witnesses, Dodge & Carter.

Carter, page 81:

Cross-Int. 163. Since 1858, have not the different persons putting up these Bitters, disregarded each other's rights, if any, as to territorial limits?

Ans. They have.

Cross-Int. 164. Then each and all have sold where they could, or pleased, have they not?

Ans. They have.

Cross-Int. 165. And these several parties have had no business interests in common, did they, but were in competition with each other, as stated in your 171st re-direct?

Ans. They were not connected, and were in competition with each other.

Cross-Int. 166. They were different firms, carrying on different business at different places, were they not?

Ans. They were.

Cross-Int. 167. And this continued for a period of years before the sale to the plaintiff, did it not?

Ans. It did.

Cross-Int. 170. Was there any legal action taken except the Bateman suit, and was there any assertion of claim after the first, as you say of any one to exclude any other from any territory, or did they all sell where they wished?

Ans. There was no legal action taken. They all sold wherever they could, without regard to each other, that is, after a short time.

Cross-Int. 171. How many years do you estimate that it was the fact that no such claim of right was made by any one of these against any other?

Ans. I should think since from about 1860 or 1861.

Cross-Int. 172. How could these parties claim that there were any exclusive rights in any of them, when each was thus transgressing the rights of all the others?

Ans. There was a mutual understanding and agreement to start with, but it was violated and went on in discord.

Same witness, page 82:

Cross-Int. 175. Did or not the Mystic people sell on territory which you considered reserved to you?

Ans. They did.

Cross-Int. 176. Did or not you sell on their limits?

Ans. I don't know that we did.

Cross-Int. 177. Did any of you sell in Maine or New Hampshire by agents or otherwise?

Ans. I think we did the last years.

Cross-Int. 178. Was there any business connection between the Mystic firm, Norman, Bateman & Dodge, when out at Rowley, and you, or between any of them?

Ans. None to my knowledge.

Cross-Int. 179. During the eight or ten years while the parties named were thus violating each other's alleged rights, would they have made any effort to prevent anybody from putting up the Bitters that had a mind to go into it?

Ans. I don't think they would.

Dodge, to the same effect, page 98, Ints. 76–80.

This presents a question of a peculiar character. Here were three or four persons or firms who at some time had had territorial grants of rights under a supposed trade-mark on a certain manufacture. After a time they divide up that territory among themselves. Then shortly they each and all deliberately go to work to trample down and violate each other's rights under

their division, and wholly disregard the trade-mark privileges of each other. Not only this, but they all also transgress the territorial limits fixed upon all their rights put together, and wholly disregard the original grant from the first grantor, and all trespass on territory which he had reserved to others. This state of things continued for fourteen or fifteen years. They were separate, distinct and competing firms. They had no common business interests, and they were all concerned in disregarding each other's rights if any, under this trade-mark, set up by these complainants, and in violating the rights of other assignees. The firms thus continued down to the very moment of the assignments to the complainants, and were the sole assignors [including Bateman who was also selling anywhere he pleased all the time] of the complainants.

Previous to the assignment to the complainants, could these parties, Dodge, Carter, Noyes & Manning and Bateman, have successfully set up any right in a court of equity, founded upon an alleged trade-mark in the disregard and violation of which they had been engaged for years; not only as against each other, but also as against all persons. Could they say that that was valid which they, the owners, had been proving was worthless and invalid? Could they thus disregard and violate a right *inter sese*, and as to others, and then claim relief under it at the same time?

That they could seems alike repugnant to equity and common sense.

Then, if they, the assignors, could not, how could their assignees, who take the alleged right in the midst of these violations of it at the hands of its owners?

4 THE TRADE-MARK RIGHT, IF ANY, WAS GIVEN UP AND OTHERS SUBSTITUTED FOR IT BY ITS OWNERS, AND SO NEVER HAVING BEEN RESUMED, WAS FORFEITED AND LOST.

The competition referred to in the evidence cited under the preceding point, produced a change in the trade-mark of Carter & Bateman, who were especial competitors in the business, both living in Georgetown, and manufacturing there.

See Bateman's circular, page 61, as follows:

☞The only safe way is for agents to send all orders to the subscriber, and consumers to purchase only those in half pint glass bottles, with the words "Atwood's Jaundice Bitters, Moses Atwood, Georgetown, Mass.," blown in the bottle: and hereafter, a facsimile of the signature of L. H. Bateman, printed with red ink across the directions upon the label.

Address,

L. H. BATEMAN,

Georgetown, Essex County, Mass.

This was published after the decision of the suit in Essex County, Mass., between Carter and Bateman, in Bateman's favor.

Hereafter the true "origin, ownership and manufacture" of his bitters were to be indicated by his own name in red ink on the label.

The words Atwood's Bitters were with him thereafter simply and only a genuine term denoting simply a class of goods, not an especial manufacture by any one person or firm.

Brown, on Trade-Marks, § § 131–137, 180, 181.

Singleton v. Bolton, 3 Doug., 193.

Precisely the same result was produced with Carter. His label was changed from that set out in the bill, page 1, to what

is seen on page 59. All his genuine bitters were afterward put up under this style.

Carter, page 57:

Int. 51. Did M. Carter & Sons or M. Carter & Son use any distinguishing marks on this medicine put up and sold by them; if so, what?

Ans. They did. They used the same label with a heading, reading:— "Carter's are the only genuine," and then it went on and read the same as Exhibit "A."

Int. 52. Why did you use the name of Carter on the label?

Ans. I used it more particularly to designate our own manufacture from those of Lewis H. Bateman's manufacture, who was our greatest competitor.

Same witness, page 75:

Int. 148. For some years previous to your sale to the plaintiff, were not your Bitters and those of Bateman, and those of the Mystic people, distinguished from each other in the trade by the names of Carter's, Bateman's, Mystic?

Ans. I think wholesale buyers, generally, knew.

Int. 149. Did, or not, other dealers also know them by these names?

Ans. I cannot say.

Int. 150. Did, or not, parties, dealers, call for the Bitters by these names when purchasing, and were there not classes of purchasers who preferred one or the other of these brands?

Ans. They frequently inquired whose manufacture they were. I think there were classes of purchasers who preferred one or the other of these brands.

That there was thus a complete abandonment of Moses Atwood's name as a trade-mark, resulting from this competition between the several claimants under Carter, Dodge & Bateman, is fully shown.

So firmly were these designations fixed upon the several classes of bitters that the selling agents for the complainants are obliged to continue the designations in their price lists. See page 214 at the bottom. [Ex. attached to J. W. Perkins' testimony.]

These bitters are now known in the market, sold, called for or ordered by these designations. This is the result of the abandonment years ago, by the former owners of the title Atwood's Bitters, as denoting origin and ownership.

Such a title could not have been honestly used by these several manufacturers, for such purpose, after Moses Atwood ceased to have anything to do with the manufacture.

The following evidence shows clearly what the present trade-marks of these bitters are.

The several names of Carter's Atwood's Bitters, Bateman's Atwood's Bitters, and Mystic Atwood's Bitters, are the only ones that now and for many years do and have denoted the origin and manufacture of the medicine.

For several reasons the term "Atwood's Bitters" now no longer serves to designate any particular manufacture.

Howe [complainants' witness], page 131:

Int. 14. Do you know of such an article in the market now, as Atwood's Tonic, or Atwood's Quinine Bitters?

Ans. I do.

Int. 15. Now what I ask is, knowing that, would the mere term Atwood's Bitters be sufficient to designate which of the two was meant?

Ans. No, it would not. There has been a time when, if I received an order from a customer, say for one dozen Atwood's Bitters, and nothing more was said, I should unhesitatingly fill the order with what I call Atwood's Jaundice Bitters. To-day, however, were I to receive a verbal order for a dozen Atwood's Bitters, I should say, do you mean Atwood's Jaundice or Atwood's Quinine Bitters; and if the latter, which size?

Int. 16. How long has this been the case?

Ans. I can't speak positively, but should say from three to five years. The Quinine have rapidly increased the last few years.

That the term Atwood's Bitters is not now and has not for a long time designated any particular article, its origin or manufacture, is proved by the fact that the complainants themselves make and sell another Atwood's Bitters with a yellow label.

Parker [complainants' witness], page 17:

Int. What other kind of bottles do the Manhattan Company use in which to put up this medicine, except the one you have marked Exhibit H?

Ans. No other that I know of.

Int. Is there not a flat bottle used by them sometimes?

Ans. There is an Atwood's Bitters put up in flat bottles, they own the trade-mark, but I have always understood it to be a distinct article; another article altogether.

Int. Is it a Physical Jaundice Bitters?

Ans. I don't remember whether it goes by that name.

Int. Is the label yellow?

Ans. I think so.

Richardson, page 191:

Int. 28. By what title were what you call the genuine article bought and sold in the market?

Ans. Carter's Atwood's Bitters.

Int. 29. Have you ever dealt in any put up like Exhibit "1" and Exhibit "B"?

Ans. We have bought the one like Exhibit "1" in case our customers ordered it, although we did not carry it in stock, but the one like Exhibit "B" we have never handled to my knowledge.

Int. 30. Have you ever dealt in an article like Exhibit "A," except it had the name L. H. Bateman on the label?

Ans. Not to carry them in stock; only to purchase at request of customers?

Int. 31. When thus requested by customers to purchase either of these two kinds, the Carter, or the Bateman, please state how the customer called for them; by what name.

Ans. He would say Bateman's Atwood's Bitters; or, if he wanted the genuine, he would say Carter's; or, if he wanted the L. F. Atwood, he would specify L. F. Atwood.

Solomon Carter, page 212:

I, Solomon Carter, of Boston, in the State of Massachusetts, being duly sworn, on oath depose and say as follows:—

Am 57 years of age; occupation, a druggist; been in the business forty years. Am acquainted with Atwood's Bitters; have bought and sold them. They are known by different label names, such as Bateman's, Carter's, etc. All have the yellow label. H. H. Hay sells these Bitters and they are distinguished by his mark, so with Wood, Carter, Bateman and others.

Some years ago these Bitters were on sale under the names of Bateman and Carter. This was the word that distinguished the kind of Bitters.

I am not aware that the yellow label or the name Atwood distinguishes the Bitters, but they are bought by the name of the manufacturers.

The color of the label and the shape of the bottle are used in putting up various medicines.

Samuel Rolfe, Page 213 :

I am a resident of Portland ; am 61 years of age. My business is that of a druggist, and have been in the business forty-five years. . . . . The use of the yellow label; the name of Atwood, or the bottle, by any one, would not interfere with the sale of any of these manufacturers' Bitters, because those things are not the mark by which they are known in the market. I have never been able, in my dealings in these Bitters, to sell them except as above described.

I have been acquainted with these Bitters ever since they were started, and do not think that many of the Bateman, Carter, or Mystic Bitters have been sold in Maine with me, at least not until a recent period. Hay's and Wood's have been the Bitters called for in Maine with me. My opinion is, that the trade in these Bitters has now become so well established under the several names of the manufacturers, that the use of anything but their names would not interfere with the business of any maker. No exclusive claim to the word Atwood, the color of the label, or the shape of the bottle was ever made known to me. The yellow label and the shape of the bottle are in use with other medicines, and have been for a long time. If one were not acquainted with the manufacturer's name, I should sell him either I happened to have. Have formerly kept both.

John W. Perkins, page 214 :

Am a wholesale druggist; have been in the business thirty years. I have bought and sold Atwood's Bitters for fifteen years under the names of Nathan Wood or H. H. Hay. These Bitters are known in the market by different names. These are Bateman's, Carter's and others. They have been so distinguished for many years. All have the yellow label and bear the name of Atwood. These were put up, I believe, first in Georgetown, Mass. M. Carter & Son and Bateman put up these Bitters at the same time in Georgetown, Mass., using the same label. The only difference between their labels is that one has the name of Bateman and the other Carter. Others have put up these Bitters, and they have been and are known by their names. H. H. Hay, of Portland, puts up and sells L. F. Atwood's Bitters. Nathan Wood puts up his Bitters, and the label has his name.

As early as 1851 these Bitters were put up by Bateman and Carter, and the business was continued for several years. No claim of any exclusive right

to the label was ever made known to us until it was recently bought by the Manhattan Medicine Company.

A yellow label and a bottle formed with twelve pannels or sides are both common, and are used with various medicines.

The distinguishing mark upon the Atwood Bitters is the name of the person by whom they are put up. They are so bought and sold.

The use of the label, the name of Atwood, by any one, would not interfere with the business of any of these manufacturers, because the Bitters are called for by the name of the manufacturer. In my dealings, I only sell them in that way. The business has become well established, and the sales are made as above described. Mr. Wood uses on his bottles the words "Moses F. Atwood," or "M. F. Atwood."

Now this evidence is not contradicted. It clearly shows that the real trade-marks of these goods to-day are, and for a long time have been, the several names of the several makers prior to the assignment to these complainants.

No pretence is made that the respondents have ever used any of these marks which are still, of necessity, used and preserved by complainants.

SUPPOSING THAT THE COMPLAINANTS HAVE ALL THE RIGHTS THEY CLAIM, WHAT PROOF IS THERE OF ANY VIOLATION OF THEM BY THE RESPONDENTS?

I first call attention to all the evidence on this point.

Let it be remembered that Carter & Dodge, under the contract of 1852, and the missing one of 1855, had no title under the alleged trade-mark, in Maine.

Luther F. Carter, page 70, Int. 71.

Two persons, one by the name of Parker, and the other by the name of Johnson, it seems were sent down to Maine to buy some bottles of Atwood's Bitters of these respondents, as testimony in this case to show violation of the alleged trade-mark.

It probably did not occur to the complainants at that time that Maine was not included in the territory assigned to Dodge & Carter by Moses Atwood, and that therefore no sales within this State would serve to prove any violation of their rights as asserted by themselves.

To show infringement upon the alleged rights of these complainants, it must be proved that Nathan Wood & Son sold the Atwood's Bitters, under the label set out in the bill [page 1], within the territory assigned to the assignors of the complainants by Moses Atwood in 1852 or 1855, and that since the Manhattan Medicine Company became owners of the rights of Carter, Dodge, Bateman, and Noyes & Manning.

The deed of the Bateman heirs is of date January, 1875.

It was assigned over to the complainants March, 1875.

Pages 23, 24.

Noyes, Manning & Co., assigned April, 1875. Pages 48, 49.

Dodge, assigned March, 1875. Pages 25, 26.

Dorman, assigned March, 1875. Page 28.

Carter, April, 1875. Pages 28, 29.

Other Carter heirs April, 1875. Pages 29, 30.

Parker visited the Woods at Portland, in May, 1875.

Johnson was a little premature; he called on them in March, 1875, before the Manhattan Medicine Company had completed their title from the various owners of the trade-mark on the Atwood's Bitters.

We will therefore drop Johnson, and see simply what Parker has to say. It is to be found on page 13, and pp. 15, 30, 16, 17.

This purchase was first in Maine to which the complainants have no title. It is quite uncertain if the bottle marked C. E. P. is the one that Parker bought, and no proof is adduced of any sale by the Woods between the time of the completion of the sale to the complainants, and the institution of the suit on territory to which the different owners under Carter & Dodge ever had any title.

No doubt sales had been made by Wood in former times in Massachusetts, but that was before the sale to complainants.

The deeds or sales from the Batemans, Carters, Dodge, and Noyes & Manning, convey no right to the complainants to recover for intrusions upon their rights prior to the sale to them. A sale on complainants' territory must be shown after the sale to complainants, and before the institution of the suit. This has not been done.

It is no proof of infringement for the appellants to show they bought the Exhibit A on territory not belonging to them.

It does not show a case of infringement for the appellants to show that Wood had sold the Bitters in territory assigned to Carter, or Dodge, or any of the alleged former owners, *before* the assignment to the complainants. The burden of proof to show infringement is upon the complainants, and sales by the

defendants *out of the State of Maine*, must be proved between April, 1875 (the date of the purchase by the complainants), and May 20, 1875, the date of the filing of this bill. Not a word of proof of this kind has been presented.

In 1861, Nathan Wood bought a right to put up the Atwood's Bitters from Moses F. Atwood, the son of Moses Atwood, and who had worked with him and with Bateman, in their preparation of the Bitters at Georgetown, Mass. For fourteen years he has carried on the business under that sale. He has so done with the knowledge of the assignors of the complainants.

M. F. Atwood, pp. 203–224.

Int. 2. State whether you have ever been concerned in the preparation or sale of Atwood's Physical Vegetable Jaundice Bitters; if you have, where and when, and state in what bottles and with what labels the same were put up?

Ans. I worked, in putting up the Bitters, for my father, Moses Atwood, until I was twenty-one years old. I then went to work for L. H. Bateman; while in his employ I manufactured and put up the Bitters for him, by a receipt furnished me by Bateman. We used a fluted bottle with the name of the medicine, and to the best of my belief, the bottle had Moses Atwood, Georgetown, blown in it. The label used was the same that was used by Carter & Dodge, except a private mark, and I do not know what that was.

Int. 3. State with whom you have been so employed?

Ans. With my father until I was of age, and after, L. H. Bateman.

Int. 4. If you say you have been thus employed with L. H. Bateman, give the date of that, and describe the bottle and label he used?

Ans. I went to work for Bateman in the year A.D. 1860. We used a fluted bottle with the name of the medicine, and I believe, Moses Atwood, George-

town, blown into it. The label was the same as used by my father and Carter & Dodge, with only a private mark difference which I don't now remember.

Int. 5. State whether you became acquainted with the manner of preparing and compounding said article, and from whom did you so become acquainted?

Ans. I did become acquainted with the medicine when I worked for L. H. Bateman, and the manner of preparing and compounding it. I became so acquainted with said article, and the manner of manufacturing and compounding from L. H. Bateman.

Int. 7. If you ever sold to any one the receipt to compound and put up said Bitters, state who it was, when it was, and what your age was at the time of such sale, and whether you sold to Nathan Wood?

Ans. I did sell a receipt to Nathan Wood, in the year A.D. 1861. I was then twenty-two years of age, and conveyed to him the right to manufacture said Bitters in the State of Maine.

Int. 8. Have you put up any of said Bitters on your own account, since said sale?

Ans. I have not.

Int. 9. Where does your father, Moses Atwood, now live? How long has he lived there?

Ans. He lives at New Sharon, Mahaska County, Iowa. He has lived there about fifteen years.

Int. 4. Did you ever sell or attempt to sell to Wood anything more than the receipt for making the Bitters? What did Wood pay you?

Ans. I did, in the writing to Wood, sell him the right to manufacture said Bitters, and sell in the State of Maine and elsewhere. He paid me money for the right I conveyed to him to manufacture and sell said Bitters.

Nathan Wood, page 173.

Int. 26. Whose son, as you understood, was Moses F. Atwood?

Ans. Moses Atwood's.

Int. 27. Where had he been residing?

Ans. Georgetown, Mass.

Int. 28. Where did he then go to reside?
Ans. He went to Iowa.

Int. 29. Was he or not, at or about the time of your purchase, settling up for sales of the Atwood's Bitters in the State of Maine?
Ans. That was the report he made.

Int. 30. Since the date of said sale to you, have you, until the visit of Eli B. Johnson to your store in 1875, ever received any notice to discontinue the preparation and sale of the article, or the use of said label and bottle?
Ans. No sir.

Int. 31. During this time, have you ever received any intimation that any one claimed any exclusive right to the use of the bottle or label, or both, like "Exhibit A, July 14, 1875"?
Ans. No, up to the time Johnson was here.

The assignors of the complainants for years previous to the sale to the complainants, knew of Wood's manufacture and sale of these Bitters, and of his use of the label.

John T. Wood, page 147, Int. 20.

John T. Wood, page 160, Ints. 155–157.

Nathan Wood, page 173, Ints. 32–39.

Dodge, page 99, Ints. 87–94.

These were the circumstances of the purchase by Nathan Wood, of the right to make the bitters.

No notice from the original owners was ever served upon him of any exclusive right in them, or of any claim to such Moses Atwood's affidavit was procured in this case, but not a word of testimony to question the right of his son to make the sale.

If he had no such right it would have been easy to have shown it.

The assignors of the complainants began with a smooth round bottle, and then changed to a fluted one. Certainly they cannot complain of Wood then, that he used two kinds of bottles.

Noyes & Manning, in Conn., and Dodge at Rowley, both printed on their labels "put up by Moses Atwood, Georgetown, Mass.," and all said put up by Moses Atwood when these representations were untrue.

How then can they come into a court of equity, and accuse Wood of misrepresentation in doing the same.

The Court will not interfere where the party complainant fails to show that on his part his acts have all been equitable and just.

WILLIAM HENRY CLIFFORD.

References to the evidence to sustain certain findings of fact by the Circuit Court, and other points made by Counsel of the Defendants, Appellees.

THAT MOSES ATWOOD NEVER ADOPTED OR HAD ANY TRADE-MARK HIMSELF, AND DID NOT PRETEND TO SELL ANY TO CARTER, OR CARTER AND DODGE: —

Carter (L.):—

Page 67, Ints. 27, 35, 42, 43.
Page 69, Int. 68.
Page 77, Int. 149.
Page 105, Int. 25.

Dodge:—

Page 85, Ints. 37, 38, 39, 40–42, 43.
Page 94, Ints. 6, 7.

Agreement, page 137.
Agreement, page 139.

THAT THE ASSIGNORS OF THE COMPLAINANTS, APPELLANTS, ASSIGNED TO THE COMPLAINANTS ONLY WHAT THEY (THE

ASSIGNORS) HAD BEEN USING, I. E., THEIR OWN ADOPTED AND MODIFIED BOTTLES, LABELS, TITLES, ETC.: —

Bateman contract, page 23.
Noyes & Manning contract, page 26.
Carter, Titcomb & Osgood contract, page 30.
Luther Carter contract, page 143.

THAT THE ASSIGNORS OF THE COMPLAINANTS, APPELLANTS, ABANDONED THE BOTTLE AND LABEL USED BY M. ATWOOD (FROM WHOM IT IS ALLEGED, IN THE BILL, THEY DERIVED TITLE), AND ADOPTED NEW ONES OF THEIR OWN.

1st, The Bottle: —

Page 55, Ints. 33, 34.
Page 71, Ints. 90–97, 84–89.
Page 85, Ints. 39–43.
Page 94, Ints. 6–10.
Page 208, Ints. 3, 5.

Cady: — Pages 209, 210.
Page 130, Ints. 11, 12.

2d, The Label: —

Page 54, Ints. 51–54.
Pages 59, 60, Int. 110.
Page 61.
Page 70, Int. 80.
Page 71, Ints. 95–97.
Page 75, Ints. 148–150.
Page 85, Ints. 39–46.
Page 94, Ints. 6–10.
Page 113, Int. 45.
Page 114, Ints. 58–61.

It is not claimed that defendants ever infringed their several new trade-marks.

THAT AFTER THE ADOPTION BY CARTER, BATEMAN, AND NOYES & MANNING, OF THE NEW LABELS, THE BITTERS BECAME TO BE KNOWN IN THEIR MARKET, AND HAVE EVER SINCE BEEN KNOWN BY THE NAMES OF THE SEVERAL MANUFACTURERS, AND ARE NOW SO DESIGNATED ON THE SALES AND TRADE LISTS OF THESE VERY COMPLAINANTS, OFFERING THEM FOR SALE: —

Page 52, Ints. 2, 3.
Page 57, Int. 51.
See Label, pages 59, 60.
Page 114, Int. 63.
Page 126, Ints. 2–6.
Page 127, Int. 19.
Page 128, Int. 27.
Page 148, Ints. 26–28.
Page 177, Ints. 74, 75.
Page 195, Int. 56.
Page 196, Int. 32.

Carter (S.): — Page 218.

Rolfe: — Page 218.

Perkins: — Page 214.

Complainants' sale list: — Page 216.

THAT UNDER THE TRADE-MARK ATTEMPTED TO BE CLAIMED IN THE EVIDENCE (WHICH IS DIFFERENT FROM THAT SET OUT IN THE BILL), A FRAUD WAS FOR A SERIES OF YEARS PERPETRATED UPON PURCHASERS AND THE PUBLIC BY ONE OF THE ASSIGNORS OF THE COMPLAINANTS, BY THE SALE OF

A SPURIOUS AND ADULTERATED ARTICLE, WHILE THE REAL BITTERS WERE MADE AND SOLD BY THE SAME PERSON UNDER A NEW AND DIFFERENT LABEL OF SAID ASSIGNOR'S OWN INVENTION: —

Page 66, Ints. 13–17.
Page 70, Ints. 75–82.
Page 73, Ints. 118–120.
Page 190, Ints. 14–22.
Page 197, Ints. 4–8.
Page 212, Ints. 4–6.

THE WORDS "ATWOOD'S BITTERS," ALONE, DO NOT DESIGNATE IN THE TRADE, ANY PARTICULAR MEDICINE. OTHERS ARE KNOWN BY THE SAME TITLE: —

Page 131, Ints. 14–16.
Page 119, Ints. 2, 3.
Page 127, Ints. 10–20.

Carter (S.): — Page 213.

Rolfe: — Page 213.

Perkins: — Page 214.

THAT THE ASSIGNORS OF THE COMPLAINANTS, APPELLANTS, VIOLATED AND DESTROYED THE TRADE-MARK, IF THERE EVER WAS ANY, AMONG THEMSELVES, BY DISREGARD OF THE RIGHTS CONFERRED UNDER IT, AND THIS FOR A SERIES OF YEARS: —

Page 81, Ints. 163–179.
Page 98, Ints. 76–80.